

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

LONGMONT UNITED HOSPITAL,

Employer,

and

Case No. 27-RC-275868

NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED, AFL-CIO (NNOC/NU),

Petitioner,

POST-HEARING BRIEF

Pursuant to NLRB Rules and Regulations 102.67, Longmont United Hospital (“Longmont United” or “Employer”), by and through its attorneys Sherman & Howard L.L.C., submits its post-hearing brief in the above-captioned matter.

STATEMENT OF THE CASE

This case arises from the Petition in Case No. 27-RC-275868 filed by the National Nurses Organizing Committee/National Nurses United, AFL-CIO (NNOC/NU) (“Union,” or “Petitioner”), through which the Union seeks to be certified as the representative of Longmont United’s Registered Nurses at its acute care hospital in Longmont, Colorado. This matter came for video hearing before Hearing Officer Stephanie Scaffidi on May 10, 2021. Longmont United was represented by Patrick R. Scully and James S. Korte of the law firm of Sherman & Howard L.L.C. The Union was represented by Nicole Daro, Esq.

ISSUES

The only issue addressed at the hearing was whether the Region should conduct a manual or mail-ballot election.¹ Tr. 35:25-36:11. Longmont United contends that a manual election can be conducted safely and only a manual election will fully effectuate the franchise of the voting unit. Tr. 16:11-17:10. The Union contends that only a mail-ballot election is appropriate. Tr. 18:1-24.

INTRODUCTION

Longmont United has maintained and demonstrated that it can comply with all requirements set forth by the Board to facilitate a safe manual election. While the procedures for conducting a manual election have changed due to the COVID-19 pandemic, the Board's presumption in favor of manual elections remains. Throughout the long history of the NLRA, the Board has been able to conduct countless manual elections in acute care hospitals. The only difference here is whether Longmont United is capable of meeting the Board's standards for conducting such an election during a pandemic.

Longmont United has committed to meeting and exceeding all requirements the Board has set forth. Indeed, there is arguably no safer environment in which to conduct a manual election, given the precautions already in place at the hospital and the sheer number of fully vaccinated employees working on a day-to-day basis. If the Board truly will permit a manual election during this pandemic, it must do so in this case. Otherwise, the Agency's purported guidelines are nothing but a transparent mask covering a rule that only mail ballot elections will be permitted.

¹ Longmont United objected, and renews its objection here, to the Regional Director's decision to discount the apparent unit issue regarding Educators and deferral of the Petitioner's allegation that House Supervisors are ineligible under Section 2(11) of the Act. The Union did not present a scintilla of evidence to support its bald assertion that the disputed Registered Nurses are Supervisors. There was no reasonable basis to defer litigation of the Unit issues in this case.

LONGMONT UNITED’S POSITION

The Board adheres to its presumption that in-person voting/manual ballots are preferable as they more fully effectuate employees’ Section 7 rights. *See Willamette Industries*, 322 NLRB 856 (1997); *see also San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998); *Reynolds Wheels International*, 323 NLRB 1062, 1063 (1997) (“[U]nder existing Board precedent and policy, the applicable presumption favors a manual election, not a mail ballot.”). In determining whether a manual election is appropriate during the current COVID-19 pandemic, the Board set forth six “situations” that will normally suggest the propriety of conducting an election by mail, rather than manual ballot. Those situations include:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by GC Memo 20-10, *Suggested Manual Election Protocols*;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

Aspirus Keweenaw, 370 NLRB No. 45 (2020). As explained in Longmont United’s Statement of Position, none of these conditions exist in the instant matter. Longmont United addresses the

Board's situations in detail below, with emphasis on the Regional Director's inquiries during the pre-election hearing.²

- 1. The 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is decreasing, and the 14-day testing positivity rate in the county where the facility is located is less than five percent.**

Longmont United Hospital is located in the County of Boulder. As of the most current data for the State of Colorado, the County of Boulder has a two-week average positivity rate of 2.9%. See <https://covid19.colorado.gov/data/covid-19-dial-dashboard>. Adjacent counties, including Broomfield and Larimer, both have two-week average positivity rates of less than five percent. As to the number of confirmed cases trends, the Boulder County's confirmed cases are declining. <https://www.denverpublichealth.org/clinics-services/infectious-disease-clinic/coronavirus-disease-2019/denver-metro-covid19-data-summary>.

As the facility is in the County of Boulder, the most relevant data for the Regional Director's decision is the data from this county. However, during the pre-election hearing the Regional Director requested the Employer provide a summary of the cities and counties in which the eligible employees live for help in determining what data is relevant. More than 53% of the Unit employees, or 131 employees, reside in the County of Boulder. Exhibit 5.³ Fifty-two employees, or 21% of Unit employees, reside in Larimer County, which has a 14-day positivity rate of 4.9%. *Id.* Thus, approximately seventy-five percent of employees reside in Counties with a 14-day positivity rate of less than 5%.

² Longmont United does not address the first situation, whether "[t]he Agency office tasked with conducting the election is operating under 'mandatory telework' status," because Region 27 is not currently operating on mandatory telework status. Tr. 40:19-24.

³ Longmont United's Exhibit 5 is a continuation of the four exhibits admitted at the Pre-Election Hearing.

2. The proposed manual election site can be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.

As asserted in Longmont United's Statement of Position, the proposed manual election site is the Matisse/Da Vinci Conference Room, which is located in a secluded area of the Hospital. *See* Exhibit 4. As The Conference Room is more than 1,000 square feet and has more than enough space to provide the appropriate social distancing for the voting employees, the Board Agent, and the Observers, Boulder County's guidelines for indoor events do not preclude a manual election. Thus, the proposed election site can be established in a way that complies with any and all applicable gathering restrictions.

3. The employer agrees to commit to abide by GC Memo 20-10, *Suggested Manual Election Protocols*.

Longmont United is committed to abide by all requirements in GC Memo 20-10. Board Exhibits 1 and 2. Specifically, Longmont United has committed to providing a socially distanced polling room that allows for separate ingress and egress. Exhibit 1-4. Longmont United will clean the polling room prior to the election and between each proposed voting period. Tr. 98:7-11. Longmont United will have plexiglass barriers installed prior to the pre-election conference to separate the Board Agent, Observers, and the voting employees. Tr. 75:4-14; Tr. 81:9-12. Longmont United will provide masks, hand sanitizer, gloves, and wipes for each observer. Tr. 81:13-15. Longmont United will put markers on the floor to maintain six feet of distance. Tr. 75:4-14. Longmont United will provide disposable pencils (without erasers), glue sticks or tape, and provide inspection of the polling area by videoconference at least 24 hours prior to the election. Tr. 81:3-8. Finally, Longmont United has put forth a viable release schedule to allow each employee the opportunity to vote in a safe and efficient manner and offered to confer with the Petitioner on the release schedule. Longmont United's release schedule is summarized as follows:

On duty Registered Nurses will be released on a partial unit by unit basis. Longmont United will have a relief/flex team on duty, which will consist of non-management employees, who can cover patient care responsibilities while unit employees are relieved for the opportunity to cast a vote. The on-duty release schedule will be conducted on a rolling basis to allow for any particular unit to have multiple opportunities to vote during the voting periods. The Board Agent will have the capability of announcing a mutually agreeable notice through the PA system to facilitate the release schedule. As to off-duty Registered Nurses, Longmont United is open to posting preferred times for off-duty nurses to come into the facility to vote. Off-duty nurses will be permitted to be screened as visitors. Tr. 100:17-101:6.

The current proposal allows the greatest opportunity to effectuate the franchise of the Unit employees. However, Longmont United welcomes any additional input from the Petitioner on a mutually agreeable release schedule. The Board is capable of holding a manual election in an acute care hospital, as evidenced by the numerous elections held at acute care hospitals across the country. Longmont United is well-versed in managing any patient care issues that may arise, and is in the best position to manage a safe and effective manual election.

4. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.

Longmont United is committed to providing the Region with the certification as required by GC Memo 20-10. At the time of the Pre-Election Hearing, no employee had tested positive for COVID-19 in the past eighteen days and only three patients in the hospital have tested positive. The patients are being treated in accordance with the Hospital's COVID precautions. Thus, there is no current outbreak in the Longmont United Hospital.

In *Rush University Medical Center*, 370 NLRB No. 115 (Apr. 27, 2021), the Board stated, "... the *Aspirus* current outbreak factor is not satisfied by evidence that Covid-19 is present at a

facility.” 370 NLRB No. 115 at slip op. 1. “Instead, the Regional Director should determine whether the Covid-19 cases at the facility would reasonably be expected to affect the conduct of a manual election.” *Id.* There is no evidence that the three patients would affect the conduct of an election. Indeed, it is entirely likely that by the time an election takes place, the three patients will no longer be COVID-19 positive. As a hospital, Longmont United has operated efficiently and effectively throughout the COVID-19 public health crisis pursuant to federal, state, and local orders.

5. Other similarly compelling circumstances.

There are no compelling circumstances to justify a mail-ballot election. Indeed, due to the recent guidelines from the CDC and Colorado, it is more appropriate than ever to conduct a manual ballot election. Specifically, the CDC and Colorado have determined that it is safe for fully vaccinated individuals not to wear masks indoors or outdoors. While Longmont United still requires masks to be worn in the Hospital, the CDC’s and Colorado’s guidelines show the safety that accompanies fully vaccinated individuals. As stated, 71% of Longmont United’s employees are fully vaccinated, increasing safety within the hospital.

The Union cites the recently emerging variants as a reason to hold a mail-ballot election. The Board, however, addressed this very argument in *Rush University Medical Center*, 370 NLRB No. 115 (Apr. 27, 2021). In analyzing this “variant” argument, the Board explained that “no changes in prevention strategies have been recommended by the CDC based on the variants currently in circulation. Such changes are only recommended for ‘variants of high consequence,’ and no such variants have been identified by the CDC to date.” *Id.* at slip op. 2. The Board went on to explain that “[t]he Acting Regional Director also did not find that any other relevant entity has made such recommendations.” *Id.* The Board concluded “that the CDC’s determination that

new variants exist does not, as of this date, constitute a ‘similarly compelling circumstance’ within the meaning of *Aspirus* factor.” *Id.*

Finally, although the Board has not addressed the relative safety of mail ballot procedures, it is well-established that Petitioner is free to conduct home visits during mail balloting. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), revd. on other grounds, 133 NLRB 1092 (1961). Petitioner has provided no assurances of its intent to comply with any CDC or other guidance during its proposed mail ballot process. Consideration should be given regarding the risks of transmission of COVID-19 that exist in a mail ballot process. The Region should not so blithely disregard Petitioner’s failure to address any safety precautions.

6. The Union’s position is inconsistent and obstructionist.

The Union put forth no legitimate issues to Longmont United’s proposals. Instead, the Union took extreme and irrational positions in an attempt to muddy the record and thwart any reasonable discussion. For example, the Union asserted that certain accommodations were not safe enough, but when an additional safety precaution was put forth, the Union claimed they constituted surveillance. The Union argued that Longmont United’s release schedule is too complicated. However, the Board has conducted hundreds (if not thousands) of manual elections in acute care hospitals with the same patient care considerations as those that exist here. Indeed, it appears the Union contends that, regardless of COVID, a manual election is not the Board’s preferred method for conducting a representation election. The contrary is true.

Given its existing infection control measures, the Employer can safely accommodate an in-person vote with social distancing and in accordance with the Board’s in-person voting guidelines. Longmont United’s plan to conduct a safe manual election protects every eligible voter, while also adhering to the Board’s preferred election method. Accordingly, the Region should conduct an in-person/manual election in this case.

Dated this 17th day of May, 2021.

Respectfully submitted,

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ATTORNEY FOR EMPLOYER

IN PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

In the Matter of)

LONGMONT UNITED HOSPITAL,)

Employer,)

and)

NATIONAL NURSES ORGANIZING)
COMMITTEE/NATIONAL NURSES)
UNITED, AFL-CIO (NNOC/NU),)

Petitioner.)

Case 27-RC-275868

POST-HEARING BRIEF BY PETITIONER NNOC/NU

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Petitioner National Nurses Organizing Committee/National Nurses United, AFL-CIO (“Union” or “NNOC/NNU”) maintains that a mail ballot election is necessary for a safe, free, and fair election during the ongoing COVID-19 pandemic, and is warranted under *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) and *Rush Medical Center* 370 NLRB No. 115 (2021). The mail ballot election should take place at the earliest practicable date.

I. Introduction

All in-person gatherings of people from separate households create an elevated risk of COVID-19 infection for each person present. This is especially true when the gathering is of registered nurses (“RNs”) working in an acute-care hospital and treating COVID-19 positive patients, and where the Employer has proposed *18 hours* of voting time in this case. All of the circumstances in this case “indicate[] that a manual election would pose a threat to health or safety,” and under *Rush Medical Center* the Regional Director should therefore direct a mail ballot election. During the hearing in this matter on May 10, 2021, the Employer painted a chaotic and incomplete picture of the logistics necessary to just *reduce* the risk of COVID-19 transmission among the participants, including the Board Agent. Each of these measures would impact the conduct of the election, including potentially disenfranchising voters and compromising the secrecy of the election, but the measures do not eliminate the health risk. By contrast, a mail ballot election would involve none of the risk, and would promote wide voter enfranchisement while preserving the secrecy and fairness of the election.

According to the CDC’s California State Profile Report, Colorado remains in a state of “high transmission.” Within Colorado, Boulder County and its surrounding counties are also all designated as red “high transmission” counties—the highest designated risk level. Hospitalizations and deaths from COVID-19 in Colorado are on the rise. Hospitalizations in the

week of May 7 increased by 17% over the previous week, and deaths increased by 3%. (*Colorado State Synopsis*, U.S. Department of Health and Human Services, May 7, 2021, available at <https://healthdata.gov/Community/COVID-19-State-Profile-Report-Colorado/6dcr-9yvv> (last visited May 17, 2021).) Only about 36% of Colorado residents are fully vaccinated. (*Id.*)

Colorado health officials have identified five variants of COVID-19 present in Colorado, including “variants of concern” that are known to be more transmissible and more likely to cause severe illness than the original virus that has already killed more than 500,000 Americans, and sickened tens of millions. The dominant variant of COVID-19 in Colorado currently is B.1.1.7, which originated in the U.K. The B.1.617.2 variant, originating in India, has also been identified in Colorado. The efficacy of vaccines against these new variants is unknown, as is whether these strains are more likely to cause multisystem inflammatory syndrome in children. (Bloomberg News, “Doctors Watch Warily as Severe Covid Infections Target Kids, May 11, 2021, <https://www.bloomberg.com/news/articles/2021-05-11/doctors-watch-warily-as-severe-covid-infections-target-kids?srnd=premium&sref=lbQAzuXj>)

On May 7, 2021 the CDC acknowledged that COVID-19 is spread through aerosol transmission, meaning that people can become infected by inhaling airborne particles that contain infectious virus. The CDC has also said that the virus can be transmitted to people more than six feet away, and can be transmitted in spaces even after the infected person has left. The risk of transmission is greatest in enclosed spaces where the concentration of infectious airborne particles can accumulate. Spending more than 15 minutes in these conditions increases the risk of transmission. (U.S. Centers for Disease Control and Prevention, “Scientific Brief: SARS-

CoV-2 Transmission,” May 7, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html>).

Additionally, research has shown that approximately half of all transmission events are from cases without or not yet showing symptoms. (U.S. Centers for Disease Control and Prevention, “COVID-19 Pandemic Planning Scenarios,” Updated March 19, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (Accessed April 16, 2021)).

The National Labor Relations Board (“Board”) has declared that mail ballot elections are warranted in appropriate circumstances during the COVID-19 pandemic. In *Aspirus Keweenaw*, the Board set forth guidelines under which mail ballot elections should be directed. “When one or more of [six] situations is present, a Regional Director should consider directing a mail ballot election.” The Board has since clarified its guidelines in *Rush Medical Center*.

II. The *Aspirus* Factors

The Board has identified guidelines for Regional Directors to consider in order to determine whether a mail-ballot election is appropriate. The existence of any one of the following six circumstances warrants the direction of a mail ballot election: (1) the Agency office tasked with conducting the election is operating under “mandatory telework” status; (2) either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher; (3) the proposed manual election site cannot reasonably be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size; (4) the employer fails or refuses to commit to abide by GC Memo 20-10, “Suggested Manual Election Protocols”; (5) there is a current COVID-19 outbreak at the

facility or the employer refuses to disclose and certify its current status; or (6) other similarly compelling circumstances. *Rush University Medical Center*, 370 NLRB No. 115 (April 27, 2021) (citing *Aspirus Keweenaw*, 370 NLRB No. 45 (2020)).

The Board has further explained that with respect to the fifth factor (current COVID-19 outbreak at the facility), the “Regional Director should determine whether the Covid-19 cases at the facility would reasonably be expected to affect the conduct of a manual election. Relevant considerations in this regard include whether (1) the number or physical location of such Covid-19 cases, or the likelihood that those cases will result in unit employees being exposed to Covid-19, indicates that a manual election would pose a threat to health or safety; or (2) current Covid-19 cases among unit employees would result in their disenfranchisement by a manual election.” *Rush University Medical Center*, 370 NLRB No. 115 (April 27, 2021)

The Union acknowledges that the first Aspirus factor does not apply here. Likewise, the Union is unaware of any mandatory state or local health order that is relevant to the third factor. However, the second, fourth, fifth, and sixth situations each necessitate the direction of a mail ballot election.

A. The Second Factor

With respect to the second factor (14-day trend in new cases, or positivity rate), the appropriate geographic area includes at least Boulder and its surrounding counties of Larimer, Grand, Gilpin, Jefferson, Adams, and Weld. The Union is aware of at least 64 eligible voters who live outside of Boulder County. The Board recognizes that “if some or all of the work force comes from areas outside the county [where the facility is located], it may be appropriate to consider data from those other areas.” *Aspirus*, slip op. at 6. Composite data for Boulder and its surrounding counties is not available, but Gilpin, Jefferson, Adams, and Weld counties all have 14-day average

positivity rates over 5%, with Gilpin County's being 12.4% and Adams County's being 8.2%. (<https://covid19.colorado.gov/data/covid-19-dial-dashboard>.) Colorado-wide data is available, and the positivity rate in Colorado as of May 15, 2021, was 5.87%. (<https://www.mayoclinic.org/coronavirus-covid-19/map/colorado>.) As noted above, the hospitalization and death rates from COVID are *increasing* Colorado-wide. Given the broad geographic area in which employees reside, and high transmissibility of COVID-19, particularly of the now-dominant B.1.1.7 variant, it is appropriate to consider data from beyond Boulder County. Looking either at state-wide data, or at the positivity rates in Boulder and its surrounding counties it is clear that the Regional Director should order a mail ballot election on the basis of the second factor alone.

B. The Fourth Factor

The fourth factor also necessitates direction of a mail ballot election. Although the Employer agreed in its Statement of Position to adhere to the standards set forth in General Counsel Memo 20-10, it was apparent at the hearing that the Employer has no coherent plan for doing so. GC Memo 20-10 requires, among other things, that procedures for releasing voters "must be sufficient to accommodate social distancing/cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board Agents and observers." *Id.* at 1. Moreover, "Release by supervisors should be avoided to the extent possible. Therefore, whenever possible, the releasing should be done by the releasing crew or other agreed upon method, not by a supervisor." NLRB Casehandling Manual (Part Two) Representation Proc., Sec. 11330.4.

At the hearing in this case, the Employer presented a chaotic and incomplete picture of what is ultimately an impracticable method for releasing voters in order to accommodate bare

minimum social distancing requirements in the proposed voting room. The Employer has proposed that a coverage team made up of “nurses from our flex team, managers who are nurses, and potentially nurses from some of our sister facility hospitals as well” would allow for “nurses of a unit [to] be released to vote at a certain time... And then, another unit of nurses will be – or a portion of that unit of nurses will be released to go vote. And go through units like that.” (Tr. 57:9-58:4.) The Employer’s HR Director confirmed that “the managers that could float in and cover, would be those in-house here at Longmont United” (Tr. 59:1-3). And counsel for Longmont made clear that the coverage team “*necessarily* may have someone who would be considered part of the management structure” (Tr. 60:11-12). The Employer’s proposal to use a coverage team that includes supervisors compromises the secrecy of the election because supervisors will be able to observe which RNs leave the floor to go vote when the coverage team is on each unit. Such arrangements are strongly disfavored.

Beyond the use of supervisors as part of the release team, the release “schedule” described at hearing is simply not practicable¹, and will not achieve the goal of ensuring that voters are not crowded, while at the same time avoiding “endangering participants by

¹ It is unfathomable that the Hospital will be able to assemble the coverage team that it described at the hearing. The departments of the hospital require difference competencies and expertise. Moreover, supervisors at the hospital rarely perform bedside nursing care. The suggestion that a team made up of eight individuals who are supervisors and RNs from other hospitals and Longmont supervisors can rove from Labor & Delivery, the ICU, the Operating Room, and the Emergency Department and provide competent nursing care so that the regular bedside nurses can step away to go vote is just not viable. Setting aside the frequent emergent situations that arise in an acute-care hospital, handing a patient off to another RN requires providing a full report on the patient’s condition and plan of care to the receiving RN and then back to the original RN upon return, in addition to donning and doffing of appropriate PPE. Release cannot be done in the Operating Room, a sterile environment in which the operating room nurse has continuous duties and cannot step away. This is why, under non-pandemic circumstances, RNs vote in union elections during their breaks and during shift change. In hundreds of RN union elections conducted by National Nurses United, a release schedule such as the one proposed by the Employer has never been used.

unnecessarily elongating exposure among Board Agents and observers.” GC Memo 20-10, 1. Although the Human Resources Director could not say the number of RNs who are typically working on a given shift, the number appears to be somewhere between 35 to 70 on weekdays. (Tr. 55:5-11) That means that anywhere from 175 to 210 RNs are off duty at any given time, and would not be subject to the release schedule. Those RNs can vote any time, resulting in crowding at the voting site. The Employer acknowledged that its proffered voting periods that would be required into order to make the release schedule feasible are “extraordinarily long” (Tr. 66:7). The Employer proposes that voting take place in six three-hour increments over two days, for a total of 18 hours. For the Board Agent and observers, that amounts to 18 hours of unnecessary indoor exposure inside a facility known to have multiple COVID-19 positive patients on site, with up to 245 individual voters passing through and contributing their aerosol particles to the environment. As noted above, the CDC has noted that “spending more than 15 minutes in these conditions increases the risk of transmission.” (“Scientific Brief: SARS-CoV-2 Transmission,” May 7, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html>)

GC Memo 20-10 requires the Employer to certify, among other things, the number of individuals who have been present at the facility who, in the prior 14 days: are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath. The Employer has no way of certifying the required information because employees may enter the facility without undergoing any COVID screening whatsoever by using their badges at entrances where no screening takes place. (Tr. 100:5-9) Moreover, the Employer does not regularly provide COVID tests to employees, so it has no way of knowing how many employees working in the facility are COVID-19 positive.

Even if the Employer's COVID-19 screening protocols were foolproof, which they are not, the protocols required to enter the building in order to vote compromise the secrecy of the election, since the Employer presumably maintains a list of everyone that enters the building and whether they are an employee, a patient, or a visitor. The Employer would therefore be able to identify employees who entered the building while they were off-duty during the voting periods in order to vote. On the basis of the fourth factor, the Regional Director should direct a mail ballot election.

C. The Fifth Factor

The Employer does not deny that patients with COVID-19 are at its facility, or that there are any COVID-19 cases among employees. The Employer does not regularly test employees for COVID-19. Because of their work with COVID-19 and other medically vulnerable patients, Longmont RNs have dramatically reduced their in-person activities outside of work, and voter turnout will be affected if a manual election is held.

Longmont Hospital is an acute-care hospital that is currently treating COVID-19 patients. The RNs in the eligible voting group are direct-care nurses, working at the bedside of, and in close contact with, medically vulnerable patients, including patients who are COVID-19 positive. Nurses have feared for their lives throughout the pandemic, and with good reason: more than 400 RNs in the U.S., and 3,810 worldwide, have died from COVID-19 at the time of this writing. Longmont RNs, like those at hospitals across the country, do not have access to appropriate personal protective equipment. In most units of the hospital, N95 respirators (the lowest level of protection appropriate for aerosol transmissible diseases like COVID) are under lock and key and are not accessible for RNs without permission from a supervisor. Longmont also utilizes "decontaminated" N95 respirators, a practice not recommended by the Food and Drug

Administration. (“FDA Recommends Transition from Use of Decontaminated Disposable Respirators - Letter to Health Care Personnel and Facilities,” April 9, 2021, https://www.fda.gov/medical-devices/letters-health-care-providers/fda-recommends-transition-use-decontaminated-disposable-respirators-letter-health-care-personnel-and?utm_medium=email&utm_source=govdelivery). RNs have also gone to extreme measures to isolate themselves from family members after working in a hospital without appropriate PPE, so as not to expose family members to COVID-19 potentially acquired at work.

Many RNs, including RNs employed at Longmont Hospital, have dramatically reduced their participation in in-person activities other than reporting to work. Turnout at an in-person manual election will be affected because of RNs’ continued desire to reduce their risk of contracting and spreading COVID-19, given the elevated risk they are exposed to due to the nature of their work. Moreover, any nurses who are quarantined or sick with COVID-19 during the dates of a manual election will be completely disenfranchised, whereas they could vote in a mail ballot election. For this reason, the Regional Director should direct a mail ballot election.

D. The Sixth Factor

The recent emergence of COVID-19 variants in Colorado constitutes a compelling circumstance warranting a mail-ballot election. According to Colorado’s epidemiologist, Dr. Herlihy, more than half of the state’s positive cases are due to more transmissible SARS-CoV-2 variants, including B.1.1.7 (UK), B.1.427/B.1.429 (California), P.1 (Brazil) and B.1.351 (South Africa). (“Colorado is in its fourth coronavirus wave as more contagious variants become dominant among cases,” <https://coloradosun.com/2021/04/09/colorado-fourth-coronavirus-wave/>) The B.1.1.7 variant is estimated to be about 50% more transmissible and have about a 64% higher mortality risk compared to pre-existing variants (Davies, Nicholas, et al., *Estimated*

transmissibility and impact of SARS-CoV-2 lineage B.1.1.7 in England,
<https://science.sciencemag.org/content/372/6538/eabg3055>; *Increased mortality in community-*
tested cases of SARS-CoV-2 lineage B.1.1.7, [https://www.nature.com/articles/s41586-021-](https://www.nature.com/articles/s41586-021-03426-1)
03426-1.)

Colorado also has the fourth most reported cases of the B.1.351 variant in the nation,
which not only is more transmissible but also has mutations shown to have reduced
neutralization convalescent and post-vaccination antibody serum. (Pearson, Carl et al., *Estimates*
of severity and transmissibility of novel South Africa SARS-CoV-2 variant 501Y.V2,
[https://cmmid.github.io/topics/covid19/reports/sa-novel-](https://cmmid.github.io/topics/covid19/reports/sa-novel-variant/2021_01_11_Transmissibility_and_severity_of_501Y_V2_in_SA.pdf)
variant/2021_01_11_Transmissibility_and_severity_of_501Y_V2_in_SA.pdf.)

In light of these special circumstances, the Regional Director should order a mail ballot
election on the earliest possible dates.

III. Conclusion

Throughout the COVID-19 pandemic, Regional Directors of the NLRB have successfully
supervised hundreds of mail ballot elections. In this case, the measures that would need to be
taken in order to merely reduce the risk of COVID-19 transmission during the 18-hour proposed
voting period would compromise the secrecy of the election and lead to voter
disenfranchisement. In order to avoid risk to all participants including the Board Agent, and to
ensure a free and fair election, the Regional Director should direct a mail ballot election
commencing on June 1, 2021.

Dated: May 17, 2021

Respectfully submitted,

NNOC/NU LEGAL DEPARTMENT

/s/ Nicole Daro

Nicole Daro

Counsel for Petitioner NNOC/NU

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years and that my business address is 155 Grand Avenue, Oakland, California 94612.

On the date below, I served the following document:

**POST-HEARING BRIEF BY PETITIONER
NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED, AFL-CIO (NNOC/NUU)**

via Electronic Mail as follows:

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***Counsel for Employer
Longmont United Hospital***

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 17, 2021, at Oakland, California.

/s/ Rob Craven
Rob Craven

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

LONGMONT UNITED HOSPITAL,

Employer,

and

Case No. 27-RC-275868

NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED, AFL-CIO (NNOC/NU),

Petitioner,

EMPLOYER’S OBJECTIONS TO THE ELECTION

Respondent Longmont United Hospital (“Respondent,” “Employer,” or “Longmont United Hospital”), pursuant to Rule 102.69, hereby files objections to the election, contends that the election must be set aside, and requests a new election, or to the extent that it is necessary, requests a hearing in the above-captioned matter.¹ In support of the Employer’s objections to the election, Longmont United Hospital states as follows:

1. Between June 15, 2021 and July 7, 2021, pursuant to a representation petition filed by National Nurses Organizing Committee/ National Nurses United, AFL-CIO (NNOC/NU) (“Union,” or “Petitioner”), a representation election was held via mail ballot. On July 7, 2021, the Board held the Ballot Count via Zoom. As of July 14, 2021, the results of the election remain pending.

¹ In accordance with Rule 102.69, the Offer of Proof is submitted only to the Board and no copy is served on the Petitioner.

2. On or around June 18, 2021, and on other dates preceding the tally of ballots, the Union, by and through its agents and representatives, engaged in the solicitation of ballots and other conduct in violation of Board law and regulations.

3. While all elections must be conducted with strict adherence to the election standards expected by the Board, mail in ballot elections present unique challenges necessitating even greater scrutiny towards the conduct of parties. In *Brink's Armored Car*, 278 NLRB 141 (1986), the Board took the “opportunity to clarify the proper handling of mail ballots.” The Board explained that, “the danger that the laboratory conditions surrounding an election may be destroyed are greater in mail balloting situations than in manual elections because of the absence of direct Board supervision over the employees’ voting.” *Id.* Thus, voting employees must strictly adhere to the instructions in the election kits, and deviation from those instructions may warrant a new election.

4. In *Professional Transportation Inc.*, 370 NLRB 132 (2021), the Board held a party’s solicitation of one or more mail ballots is *per se* objectionable. The Board held that attempted mail ballot solicitation undermines the integrity of the Board-conducted election, secrecy of employee ballots, and improperly suggests that the soliciting party is officially involved in running the election. The solicitor effectively “asks the voter to disregard the voting instructions, which instruct the voter not to permit any party to handle or collect ballots.” The solicitation thus “creates an appearance of irregularity simply because the person responsible is a party agent rather than a Board agent.” (Internal quotations and citation omitted).

5. In *Professional Transportation*, the Board determined the Union engaged in impermissible solicitation when the Union representative left a voicemail on an employee’s answering machine, eliciting a call back, stating “I just wanted to see if you got, if you guys got

your ballot today. [I]f you can give me a call back... [a]nd if you need help on [sic] getting it sent back one way or the other, I can help you with that. Just because it's so complicated. But anyway... I hope to talk to you soon..." This request violated applicable rules and gave the appearance that the solicitor shared the Board's responsibility to collect and review ballots.

6. In *Professional Transportation*, the Board held that "solicitation will be a basis for setting aside the election only where the evidence shows that a determinative number of voters were affected." In evaluating the number of affected votes, the Board considers evidence regarding: (1) the number of unit employees whose ballots were solicited, (2) the number of employees aware of ballot solicitation, and (3) whether the soliciting party engaged in a pattern or practice of solicitation (for example, by using a common script) that reasonably suggests that other employees were solicited in addition to those for whom there is direct proof of solicitation.

7. Here, the Union solicited employee ballots by using a scripted prompt, the contents of which gave the impression that the Union had the authority to collect and inspect ballots and envelopes. On information and belief, the Union engaged in a pattern or practice of solicitation/interference with employees' mail ballots. In these circumstances, the Union's *per se* objectionable conduct likely affected the outcome of the election.

8. While the Union's conduct constitutes unlawful solicitation that is *per se* objectionable under *Professional Transportation*, the conduct is also objectionable because it generally casts doubt on the integrity of the election. *Fessler & Bowman, Inc. & Loc. 9, Int'l Union of Bricklayers & Allied Craftworkers, Afl-Cio, Petitioner & Loc. 16, Operative Plasterers & Cement Masons Int'l Ass'n, Afl-Cio*, 341 NLRB 932, 933 (2004) (Conduct that casts doubt on the integrity of the election process requires the election to be set aside).

9. The Union's interference with the transmission of the ballots is objectionable, because even the appearance of the opportunity for ballot tampering casts doubt on the election. In *Fresenius USA Mfg., Inc. & Int'l Bhd. of Teamsters Loc. 445, Petitioner.*, 352 NLRB 679 (2008), the Board ordered a new election despite the fact that the union presented no actual evidence of ballot tampering. The Board held that the employer's unsupervised opportunity to inspect the ballots, in and of itself, cast doubt on the integrity of the election. *Id.* at 681. Accordingly, a new election was warranted.

10. Through their communications, the Union "donned a false cloak of Board authority," implying the Board did not have total control of the election. In *Goffstown Truck Ctr., Inc.*, 356 NLRB 157 (2010), the Board reversed a hearing officer's recommendation to overrule the employer's objection alleging a union organizer engaged in objectionable conduct sufficient to set aside the election. In *Goffstown*, a union organizer visited voters' homes and told the voters "she was there 'on behalf of the NLRB' to determine how the employees were voting, because 'they' were trying to determine whether to go forward with the election, and whether there was enough interest in union representation." *Id.* at 157. The Board held that the organizer misrepresented herself to appear that she was acting on behalf of the Board, creating the inference that the Board was not neutral. *Id.* at 158. The organizer "donned a false cloak of Board authority" with her communications with the voters. *Id.* Accordingly, the Board ordered a new election. *Id.*

11. Through their communications, the Union implicitly indicated the Board supported their position. This is unacceptable. *Ryder Mem'l Hosp.*, 351 NLRB 214 (2007) (Union's elimination of disclaimer language in sample ballot is *per se* objectionable, because it misleads employees to believing the Board endorses a party in the election.)

12. Through the use of scripted communications, the Union solicited ballots and created the impression that the Board was not in complete control of the election and/or favored the Union in the election. The Union's "false cloak of Board authority" indicated that the Union, like the Board, had the authority to collect and inspect ballots and envelopes and instruct employees on how to fill out and submit the same. The Union encouraged voters to disregard the election kits and instead follow Union directives when filling out their ballots and envelopes. Longmont United Hospital is not required to present actual evidence of ballot tampering, the Union's interference is *per se* objectionable, and its conduct casts doubt on the integrity of the election. Accordingly, a new election must be ordered.

Dated this 14th day of July, 2021.

Respectfully submitted,

SHERMAN & HOWARD L.L.C.



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ATTORNEY FOR EMPLOYER

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

LONGMONT UNITED HOSPITAL,

Employer,

and

Case No. 27-RC-275868

NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED, AFL-CIO (NNOC/NNU),

Petitioner,

LONGMONT UNITED HOSPITAL'S POST-HEARING BRIEF

Patrick R. Scully
James S. Korte
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Pursuant to NLRB Rules and Regulations 102.69, Longmont United Hospital (“Longmont United” or “Employer”), by and through its attorneys Sherman & Howard L.L.C., submits its Post-Hearing Brief Regarding The Election Challenges in the above-captioned matter.

STATEMENT OF THE CASE

This case arises from the Petition in Case No. 27-RC-275868 filed by the National Nurses Organizing Committee/National Nurses United, AFL-CIO (NNOC/NNU) (“Union,” or “Petitioner”), through which the Union seeks to be certified as the representative of Longmont United’s Registered Nurses at its acute care hospital in Longmont, Colorado. The Election in this matter took place via mail ballot. The NLRB mailed the voting ballots to eligible voters at 1 p.m. on Tuesday, June 15, 2021, with a deadline to return the ballots by Wednesday, July 7, 2021. The NLRB conducted the ballot count on July 7, 2021. The Tally of Ballots resulted in 93 votes cast for the Petitioner, 84 votes cast against the Petitioner, and fifteen challenged ballots. Thus, the challenged ballots were sufficient in number to affect the results of the election.

The original challenged ballots consisted of eleven Board Agent challenges and four Employer challenges. The Parties submitted their Statements of Position on July 14, 2021, in which the Union withdrew its objection to the Educators being included in the Unit and agreed with two of the Employer’s Challenges. On August 13, 2021, the Board tallied the ballots of the four educators, which resulted in 93 votes cast for the Petitioner and 88 votes case against the Petitioner, with seven challenged ballots outstanding. Thus, the challenged ballots remained sufficient in number to affect the results of the election.

The Board ordered a hearing to determine the eligibility of the remaining challenged voters. On July 31, 2021 and September 1, 2021, the Board convened the hearing, with Mr. Jose Rojas presiding as the Hearing Officer.

ISSUES

The issues to be resolved include:

1. Whether Ms. Aangeenbrug was employed during the eligibility period and on the day she cast her ballot?
2. Whether Ms. Schalamon signed her ballot in accordance with NLRB voting requirements?
3. Whether certified Registered Nurses classified as House Supervisors have the independent authority to assign, transfer, layoff, and recall, as defined in Section 2(11) of the Act? *See* Tr. 37:16-20 (“The indicia that the Union is relying upon is that the house supervisors have, and exercised the authority to, lay off, recall, assign, [and] transfer... employees.”).

Longmont United carried its burden to show that Ms. Aangeenbrug was not eligible to vote in the election at the time she cast her ballot. Longmont United further carried its burden to show that Ms. Schalamon did not sign her ballot, and thus, her ballot was void at the time she remitted her ballot. The Union has the burden to show that the House Supervisors are Supervisors under the Section 2(11) of the Act. The Union failed to carry its burden.

THE HEARING OFFICER'S RULINGS DENIED THE EMPLOYER A FAIR HEARING

I. The Hearing Officer's revocation of the Employer's Subpoena paragraph D was improper.

The Hearing Officer improperly revoked Paragraph D of the Longmont United Subpoena, Subpoena No. B-1-1DGBCHV, requesting "The original declaration attached to the Union's Statement of Position and correspondence transmitting the same." Bd. Ex. 4. The Hearing Officer granted the Petitioner's Petition to Revoke based on Counsel's representation that she already produced the Originals. Tr. 26:13-27:9. The Hearing Officer further stated that the confidentiality interests of employees who have engaged in Section 7 activities in communicating with the Union are greater than the Employer's need. *Id.* In other words, the Hearing Officer concluded that employee communications with Union counsel regarding statements prepared for this litigation is "Section 7" activity and cannot be produced. This ruling was improper and contrary to law. There is no privilege between Union Counsel and an employee of Longmont United. Further, Ms. Schalamon confirmed that her communication with Union counsel was not Section 7 activity, but that there were communicating, both verbal and via e-mail regarding the testimony to be presented during the hearing. Tr. 112:4-10. Counsel for the Union introduced what purported to be a statement of Ms. Schalamon into the record. The effect of the Hearing Officer's ruling (without even in camera review) is that Counsel for the Union can pick and choose what prior statements are producible pursuant to a subpoena. The Employer has a right to introduce prior inconsistent statements to impeach a witness's credibility. *In Re Trailways, Inc.*, 237 NLRB 654 (1978). These communications, along with the original declarations, were subject to a legal Subpoena request made by the Employer and the failure to order them produced them denied the Employer a fair hearing.

II. The Hearing Officer improperly limited cross-examination regarding a prior sworn statement.

The Hearing Officer improperly limited the Employer's cross-examination of Ms. Schalamon concerning her prior sworn statement and the manner in which it was created/collected. The Hearing Officer refused to allow inquiry into the creation of the statement, the input of Union counsel into Ms. Schalamon's purported representations, and who was present when the statement was collected. The Hearing Officer did not even require production of the original statement. All of these matters bear directly on the credibility of the witness—insofar as her hearing testimony was based on any of those interactions or that her prior statement was false, coerced, or simply written for Ms. Schalamon by Ms. Daro or another third party. Ms. Schalamon referred to the sworn statement as a "form" (Tr. 106: 14-16), suggesting that her sworn prior statement was not, in fact, her statement at all. Obviously the Rules of Evidence and basic fairness permit the presentation of a witness' prior sworn testimony. Tr. 118:10-18. More importantly, the Hearing Officer's interference with proper cross examination and his apparent attempts to protect the witness and/or Ms. Daro deprived any reader of the record a full and fair opportunity to weigh the critical issue of credibility.

III. The Hearing Officer Improperly Revoked the Employer's Subpoena Issued during the Hearing.

During the hearing, the Hearing Officer, in an attempt to resolve some ambiguity in the Employer's original Subpoena, issued a subsequent Subpoena to the Employer. The Employer served its Subpoena on Counsel for the Petitioner. Bd. Ex. 5. Counsel for the Petitioner produced no documents in response to the Subpoena, but only identified the Bates labels of documents purportedly produced by the Employer. Tr. 262:20-263:1. This was not proper compliance with

the Subpoena. As the Subpoena states, the Custodian of Records for the Petitioner, Union Counsel Daro, is required to *physically* produce the documents to the Employer. Bd. Ex. 5. However, the Hearing Officer agreed with Petitioner and found that by simply identifying documents that were purportedly responsive to the Employer's subpoena was sufficient to comply with the Subpoena. Tr. 263:4-11. The Hearing Officer then inexplicably found that such compliance with the Subpoena served as a basis to *revoke the Subpoena*. Tr. 264:4-10. Under Rule 102.31(b), compliance is not a basis for finding a subpoena request invalid. It is of course illogical, as how could the Hearing Officer simultaneously agree that documents should be produced (albeit by Counsel's bare representation) and revoke the Subpoena? The improper ruling facilitated the Hearing Officer's biased ruling excusing Ms. Daro from verifiable compliance and brought an end to discussion of the Subpoena, as it had been revoked. Despite the Hearing Officer's apparent insecurity about his ruling and his vow to make "other " rulings (other purported bases for the petition to revoke) when he writes the hearing report, the damage to the record has been done. Tr. 264:11-13.

After Petitioner's Counsel stated that she was the custodian of records for the Union, the Hearing Officer precluded the Employer from any opportunity to question the custodian of records regarding the documents that were apparently sufficient to comply with the Employer's Subpoena. Tr. 288:8-289:20. In contrast, the Hearing Officer permitted Union Counsel's full examination of the Employer's custodian of records. The Hearing Officer was clearly attempting to shield Ms. Daro from an uncomfortable experience. Perhaps that is a motivation rooted in decency, but it is not proper. The Union's witnesses confirmed that there were additional documents (described above) and while the Hearing Officer purported to rely on the representation of an "officer of the

court,” Union witness Schalamon pointed out that her alleged statement was a “form” and not her words. The fact that a statement likely collected by Counsel for the Union was demonstrably false at least calls for the examination of the custodian for further responsive documents. The Hearing Officer’s failure to permit further inquiry into the Union’s production destroyed even the appearance of due process.

IV. The Hearing Officer improperly attempted to cure question from Petitioner’s counsel.

During questioning regarding House Supervisors’ alleged authority, Counsel for the Employer objected to Petitioner’s question because it assumed “facts not in evidence.” Tr. 227:10-12. In response, the Hearing Officer stated: “Yeah. I mean, your objection’s overruled. *She testified that she -- part of her duties when she appear -- or acting as a house supervisor is scheduling staff.* So Ms. Block, please answer the question. If you need it repeated, please ask Ms. Daro to repeat it.” Tr. 227:17-21 (emphasis added). This fact was NOT in evidence. *See generally* Tr. 224-227. Indeed, there is no evidence in the entire record that House Supervisors “schedule[] staff.” *Id.* Ms. Block testified on cross-examination that House Supervisors do not schedule employees. Tr. 243:2-23. The Hearing Officer’s ruling on the Employer’s objection was improper and contrary to the evidence in the record.¹

¹ The Hearing Officer’s conduct further calls into question his impartiality. It is undisputed that House Supervisors do not write any schedules at the Hospital. The attempt to bolster the Union’s failure to adduce any evidence that House Supervisors assign employees cannot be overlooked.

V. The Hearing Officer improperly failed to consider the Employer's Motion to Dismiss.

The Employer made a Motion on the record to dismiss the Board Agent challenges based on the Union's failure to meet its burden. As the Employer made clear, the Motion was premised on the fact that the record provides no basis for the Regional Director to reach a conclusion finding the House Supervisors are Supervisors under the Act. The Hearing Officer effectively ignored the Employer's Motion. Tr. 293:25-294:14.² The Hearing Officer did not explain that he needed to review the record to verify the Employer's claims, he did not address any of the points made in the Motion, and he did not solicit any response from Petitioner. He simply treated the Motion as a *pro forma* annoyance and denied it out of hand.

INTRODUCTION

The Board is tasked with conducting a fair and free election of employees to determine if a majority of the eligible voting employees in the Petitioned-For Unit wish to be represented. The Board has set specific rules to protect this sacred election process from taint and abuse, which are of particular concern in a mail ballot election. Two of those rules are at issue in this case. First, an employee must be employed in the Unit at the time he or she casts her ballot. Second, an eligible employee must sign his or her ballot or the ballot is void at the time it is remitted.

The Employer challenged the ballot of Ms. Christina Aangeenbrug because she was not employed in the Unit when she cast her ballot on June 24, 2021. Ms. Aangeenbrug's employment

² The Hearing Officer appeared bored and impatient as Counsel for the Employer respectfully delivered the argument to deny the House Supervisor Challenges.

records indisputably show that she was transferred out of Longmont United on June 13, 2021 and has not worked a single shift at Longmont since April 4, 2021. While the Union contends that Ms. Aangeenbrug was somehow still employed at Longmont United on June 24, 2021, the Union failed to elicit testimony from Ms. Aangeenbrug and failed to present any evidence to rebut the employment records. Ms. Aangeenbrug is not eligible to vote in the election.

The Employer challenged the ballot of Ms. Mysti Schalamon because she did not sign her ballot in accordance with the Board's well-established rule. Ms. Schalamon admitted that every document she signed (sixteen documents) during her employment at Longmont United were her signature. The name written on Ms. Schalamon's ballot, however, has no resemblance to her admitted signature. The Union, knowing the issue with Ms. Schalamon's ballot, engaged in a result-driven process to transform what she inscribed on her ballot into something that would validate her ballot. However, the only undisputed fact uncovered at the hearing was that Ms. Schalamon's *actual and confirmed* signature is not present on her ballot. Thus, under the Board's well-established rule, her ballot was void at the time she printed her name on the ballot.

At the Union's insistence, the Board Agent challenged the ballots of five House Supervisors as statutory supervisors. The Union's attempt to exclude these employees, however, is not based on any evidence of supervisory indicia, but simply to prevent these employees from exercising their Section 7 rights because the Union perceives them as unfavorable votes. This is clear when looking at the Union's limp presentation lacking any specific or concrete examples of the House Supervisors performing any duty that can be construed as supervisory. The Union woefully failed to meet its burden and the Board Agent's challenges should be overruled.

FACTS

VI. Christina Aangeenbrug's Employment History

Christina Aangeenbrug's last shift at Longmont United Hospital occurred on the overnight shift on April 3, 2021 and April 4, 2021. Tr. 47:9-12. On April 4, 2021, Ms. Aangeenbrug was placed on a leave of absence until April 23, 2021. Tr. 16-22. On April 24, 2021, Ms. Aangeenbrug began working at the Avista and St. Anthony's COVID vaccine clinics. *Id.* On June 8, 2021, Ms. Pena e-mailed Ms. Roberts, Ms. Reed, Ms. Anaya Quiroga, and Ms. Kmentt regarding Ms. Aangeenbrug's transfer, stating:

I wanted to provide you all with an update regarding Christina's ADA job placement. She had a meet and greet on Friday, June 4, for an RN Clinic position at the 84th' Clinic in Westminster. The meet and greet went great and we will be placing Christina in the role starting 6/13/21.

E. Ex. 1.

Consistent with Ms. Pena's email, on June 8, 2021, Ms. Aangeenbrug was offered employment at the 84th Avenue Clinic. E. Ex. 2. On June 9, 2021, Ms. Aangeenbrug accepted this employment by signing the offer letter. *Id.* at 2. On June 13, 2021, Ms. Aangeenbrug was permanently transferred to the 84th Avenue Clinic. E. Ex. 3. While the 84th Clinic honored prior vacation Ms. Aangeenbrug had planned, all time beginning on June 14, 2021, was charged to the 84th Avenue Clinic because that was her place of employment. *See* E. Ex. 4. On June 21, 2021, Ms. Aangeenbrug returned from her vacation and began work at the 84th Clinic. *Id.* Ms. Aangeenbrug has **not** been employed at Longmont United Hospital since June 13, 2021 and has not physically worked at Longmont United since April 4, 2021. *See* E. Ex. 1-4. On June 24, 2021, Ms. Aangeenbrug cast her ballot in the present election. Bd. Ex. 3.

VII. Misty Schalamon's Void Ballot

Ms. Schalamon has signed many documents in her six years of employment at Longmont United. *See* E. Exs. 6-7. Ms. Schalamon signed approximately sixteen documents during her employment, which were all introduced into the record. Each signature is nearly identical to the below exemplar:

Employee Name (P	(b) (6), (b) (7)(C)
Employee Signature	(b) (6), (b) (7)(C)

E. Ex. 6.

Based on the evidence of Ms. Schalamon's signature, as reflected in years of employment documentation, the Employer challenged her ballot based on the indisputable evidence that Ms. Schalamon's signature did not appear on her ballot, and thus, was void at the time it was remitted.

Due to the Employer's challenge that her signature was **NOT** on the ballot, the Union drafted a statement for Ms. Schalamon and presented the statement to Ms. Schalamon. With knowledge that the name written on her ballot was the subject of a challenge, Ms. Schalamon wrote her name on the Declaration, under penalty of perjury. Ms. Schalamon denied she wrote the statement and denied that the words in the Declaration were her words. Tr. 119:3-14. Indeed, Ms. Schalamon referred to the document as a "form." Tr. 106:14-16. To avoid the obvious implications of Ms. Schalamon's testimony, Counsel for the Petitioner stated that Union Exhibit 3 was simply an alleged exemplar of Ms. Schalamon's signature. Tr. 109:11. The Hearing Officer then precluded the Employer from probing the origin of this seemingly prior sworn statement. *See* U. Ex. 3; Tr. 116:23:118:22.

After the Hearing Officer precluded a fair cross examination of the witness, Ms. Schalamon went through each signature contained in her personnel file and admitted that each respective signature was her own. E. Ex. 6; Tr. 124:6-128:11. Ms. Schalamon further admitted that she signed a training document in October 2020. E. Ex. 7; Tr. 124:1-5. It is undisputed that her signature, that has remained consistent throughout her five years while employed at Longmont United, is not on the ballot. *See* E. Ex. 5. Further, on direct examination, Ms. Schalamon admitted that the cursive spelling of her name on her Social Security Card was not her signature. Tr. 107:20-25.

Ms. Schalamon admitted that she was in communication with the Union's attorney regarding the basis for the Employer's challenge, specifically that she did not sign her ballot. Specifically, Ms. Schalamon testified to the following:

Q. And Ms. Daro explained to you, didn't she, that it was important that your ballot be counted in this process.

A Yes.

Q And did she explain to you that the -- the Union's margin was dependent upon whether or not your ballot was counted?

A Yes.

Tr. 121:4-9. Thus, prior to writing her name on the Declaration, Ms. Schalamon knew that her ballot was 1) being challenged because of how she wrote her name, 2) that it was important that her ballot be counted, and 3) that the Union depended on her ballot being counted. *Id.*

VIII. House Supervisors

a. Primary job Duties

All House Supervisors are certified Registered Nurses. House Supervisors' primary job duty is being a resource to the staff RNs and Charge Nurses. In their capacity as a resource nurse, House Supervisors assist other nurses in anything they may need including, transporting patients,

taking patients, and delivering supplies. Tr. 188:14-19; Tr. 191:8-14. House Supervisors are available to provide care for patients as needed and frequently participate in helping to start IVs throughout the hospital. Tr. 189:22-25. House Supervisors collaborate with nursing management and Charge Nurses to make sure that the hospital is staffed in accordance with the hospital's policies and procedures. Outside of the permanent House Supervisors, other Registered Nurses also fill in as House Supervisors on a part-time basis and voted in the representation election. Tr. 188:23-189:2.

Longmont United maintains an Administrator On-Call ("AOC") at all times. The AOC's job is to address all concerns that a House Supervisor may encounter on a given shift. Tr. 190:4-11. For example, if any employee was acting strange, the House Supervisor would call the AOC to determine what he or she should do in respect to that employee. Tr. 190:15-25. The House Supervisor does not have independent authority to send the nurse or employee home. Tr. 191:2-7. The AOC, not the House Supervisors, are accountable to senior management for any issues that may arise on a given shift. Moreover, House Supervisors do not lay off employees nor do they recall laid off employees. Tr. 251:14-19. Similarly, House Supervisors do not have the authority to permanently transfer employees. Tr. 200:22-201:9.

b. Scheduling and Staffing

House Supervisors are not involved in creating the schedules for any employees at Longmont United. Tr. 191:15-21; Tr. 243:6-23. Rather, scheduling is the responsibility of the Department Leaders and the Nurse Manager. *Id.* House Supervisors are responsible for adjusting staffing levels and follow the predetermined "Staffing Plan" (also referred to as the Staffing Matrix or Staffing Grid) in performing this function. *See, e.g.* E. Exs. 8-9; Tr. 196:22-25. The Staffing

Plan is composed by senior management (and available to all nurses) and dictates how many RNs, CNAs, techs, and other employees are needed based on the number of patients in the hospital. *Id.*; Tr. 192:16-19. The House Supervisors are not involved in creating the Staffing Plan. Tr. 244:7-10. Depending on the how many RNs are scheduled by the nursing manager and the number of patients in a particular unit, the House Supervisor will know if a particular unit is overstaffed or understaffed according to the predetermined Staffing Plan. *See* E. Ex. 9. House Supervisors are instructed to follow the Staffing Plan as closely as possible. Indeed, Ms. Block testified that she has been told by her supervisor to maintain the exact staffing levels as set forth in the Staffing Plan. Tr. 231:12-15. Sometimes the Staffing Plan will have, for example, 3.6 RNs listed for a specific unit based on the number of patients in that unit. *See* E. Ex. 9; Tr. 195:20-196:9. In that instance, the House Supervisor will confer with the Charge Nurse to determine if the Charge Nurse needs three or four RNs based on the Charge Nurse's knowledge of the patients and the skillsets of the nurses on-duty. *Id.*

When additional RNs are required based on the Staffing Plan and the unit's needs, as dictated by the Charge Nurse, the House Supervisor works off a list from each Department Leader and/or Nurse Manager that facilitates identifying whom should be called in on a particular day and shift. Tr. 198:20-199:2. The House Supervisor is then responsible for calling employees. *Id.* The House Supervisors do not independently determine who is competent to work a particular shift. Tr. 232:12-18. Ms. Block testified that she has had to plead with staff to come in to work because House Supervisors cannot force employees to come in to work when they are not scheduled. *Id.* In instances when finding additional staff proves difficult, the House Supervisor can go to the

AOC and request the ability to offer bonus pay. *Id.* The AOC makes the determination as to whether bonus pay is warranted. *Id.*

In instances when a particular unit is overstaffed, as determined by the Staffing Plan and the Charge Nurse on that unit, the House Supervisors similarly work off a log that keeps track of who stayed home last or which employee(s) may want to be called off for a particular day. Tr. 198:20-199:2. Ms. Block testified that during the two shifts she worked as House Supervisor, she could not remember sending someone home. Tr. 242:12-16. The House Supervisor may also put an employee on a “delayed start.” Tr. 181:8-15. Again, the Staffing Plan is the document that dictates whether an employee(s) need to be placed on a delayed start because the unit is overstaffed. *Id.*

In both cases, when a unit is overstaffed or understaffed, the House Supervisors do not determine the competency of the nurses they call in or call off. Tr. 201:10-20. That decision is made by the educators, the managers, or other RNs in the unit. *Id.* Each unit maintains a list which identifies whether a specific individual is competent to work in a particular unit or on a particular patient. Tr. 201:21-24. The House Supervisor has no role in this process. *Id.*; Tr. 201:10-20.

Moreover, the House Supervisors consult Charge Nurses, who are in the Unit, to determine which associates’ turn it is to “float” between departments. Tr. 157:5-14. Typically, floating is handled on a first in first out basis, so the last person to float does not float the next time a float is required. *Id.* This process is managed by a list that is consulted whenever a float is being considered. Tr. 180:25-181:5. However, who is eligible to float is dependent on whether a particular nurse has the skills necessary to work in a unit. Tr. 172:6-16. Again, whether a nurse is competent to work in a particular unit is **not** determined by the House Supervisor. Tr. 201:10-20.

c. Relationship between House Supervisors and Charge Nurses.

The House Supervisors work closely with Charge Nurses. The Charge Nurses update the House Supervisors regarding their respective units, including the census, acuity of patients, and skillsets of the employees on duty. Those metrics are the responsibility of the Charge Nurse. House Supervisors are not responsible for the assigning of an employee to a range of duties and to specific patients. Tr. 192:6-11; Tr. 241:18-242:2. The Charge Nurses are responsible for each of those determinations. Tr. 192: 6-11. Ms. Chrisley testified that as the ICU Charge Nurse, she oversees the ICU unit “as a whole.” Tr. 148:4-10. Ms. Chrisley testified that she “make[] sure that the nurses feel supported in terms of having the hands that they need to accomplish their tasks, tr[ies] to facilitate everyone getting breaks, lunches, and then, [manages] the in and out flow of... the ICU.” *Id.* Ms. Chrisley further testified that she assists the House Supervisor “to place patients in open beds.” *Id.* Ms. Chrisley testified that she, as Charge Nurse, is the person responsible for assigning RNs to patients based on the “acuity of the patient and the skill set of the RN.” Tr. 158:12-17. Ms. Chrisley explained that Charge Nurses “look[s] at the acuity of all of the patients and try to split them up equitably. We look to see if a nurse has had that patient prior, to try to continue continuity of care. And if there’s a certain skill set that’s needed, [] then we place that patient appropriately.” Tr. 160:12-19. The House Supervisors have no knowledge, outside what they are provided from the Charge Nurse or other RNs on a particular unit, regarding patient acuity. Tr. 250:9-251:12. Other than when a House Supervisor is providing direct patient care, they do not assess the acuity of a patient. Tr. 251:5-11.

House Supervisors do not have access to nor involvement in staffing, scheduling, or overseeing the Birthplace unit. Tr. 244:21-245:10. Instead, Charge Nurses in the Birthplace unit

handle the staffing in the same way the House Supervisors would with respect to other units. *Id.*; E. Ex. 8. That is the Charge Nurses work off the Birthplace Staffing Plan to determine if the appropriate number of nurses are scheduled.³ E. Ex. 8.

LEGAL ANALYSIS

The record testimony and the applicable law conclusively demonstrate that: 1) Ms. Aangeenbrug was not employed in the unit at the time she cast her ballot; 2) Ms. Schalamon did not sign her ballot in accordance with NLRB voting requirements and her ballot is void; and 3) the House Supervisors are not statutory supervisors as defined in the Act and are eligible to vote.

I. MS. AANGEENBRUG WAS NOT EMPLOYED AT LONGMONT UNITED AT THE TIME SHE CAST HER BALLOT.

It is well-established, and the Union agrees, that only “employees *employed on the eligibility date and on the date of election* are eligible to vote...” *Plymouth Towing Co.*, 178 NLRB 651 (1969) (emphasis added). Ms. Aangeenbrug’s ballot envelope is post-marked on June 24, 2021, creating a presumption that her ballot was mailed on June 24, 2021. *See* NLRB Rules and Regulations §102.2(b); 26 U.S.C. 7502 (permits the postmark on the document or the certified or registered receipt to constitute evidence of delivery through a presumption of receipt on the postmark date). Ms. Aangeenbrug’s official employment at Longmont United ended on June 13, 2021, when she was transferred to the 84th Avenue Clinic, which is part of the St. Anthony North Campus. E. Exs. 1-4. Since April 4, 2021, and certainly since June 13, 2021, Ms. Aangeenbrug has not worked at Longmont United Hospital.⁴ Tr. 47:9-15. Ms. Aangeenbrug’s time records

³ These employees were eligible to vote in the election and were not challenged.

⁴ The Union did not present testimony from Ms. Aangeenbrug even after she apparently presented the Union with a Declaration that was attached to its Statement of Position. Accordingly, the Hearing Officer should invoke an adverse inference that Ms. Aangeenbrug’s testimony would have

further show that from June 21 through June 24 (the day she mailed her ballot), she worked at the 84th Avenue Clinic. E. Ex. 4. There is no evidence to suggest, as the Union does, that Ms. Aangeenbrug was “employed [at Longmont United] on the eligibility date and on the date of election...” *Plymouth Towing Co.*, 178 NLRB 651 (1969). Accordingly, Ms. Aangeenbrug’s was not eligible to vote in the election and her ballot should not be counted.

II. MS. SCHALAMON’S UNSIGNED BALLOT IS VOID

It is undisputed that “[b]allots that are returned in envelopes with no signatures or with names printed rather than signed should be voided.” NLRB Casehandling Manual, Part Two, Representation Proceedings, at 11336.5(c) (*citing Thompson Roofing, Inc.*, 291 NLRB 742 (1988)). In *Thompson Roofing, Inc.*, the Board made clear that

the Board has adopted specific procedures for mail ballot elections to preserve the integrity of the election process. These procedures, including the pertinent instructions here that voters sign and not print their names on the ballot envelope, are necessary because mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over the employees’ voting.

Thompson Roofing, Inc., 291 NLRB 742, at n. 1 (1988). In holding that ballots that do not reflect the voter’s signature are void, the Board majority rejected the Dissent’s argument that “[w]here, as here, there is no contention that [the employee] did not in fact cast this ballot and there is no suggestion of any fraud, a refusal to count the ballot elevates form over substance.” *Id.* at 743. The Board has therefore rejected Petitioner’s apparent contention that voiding Ms. Schalamon’s ballot elevates form over substance. The Board is unconcerned with whether there is actual fraud.

been unfavorable to the Union. *See Carpenters Local 405*, 328 NLRB 788, 788 fn. 2 (1999) (“it is well established that the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony may appropriately give rise to an inference that the witness’s testimony would be unfavorable.”).

Rather, the Board is concerned with preserving the integrity of the election by requiring each voting employee to follow the specific procedures for mail ballot election. Those procedures require that “[b]allots that are returned in envelopes with no signatures or with names printed rather than signed should be voided.” NLRB Casehandling Manual, Part Two, Representation Proceedings, at 11336.5(c). Ms. Schalamon’s ballot was returned without her signature, and thus was void at the time she remitted her ballot.

Ms. Schalamon admitted that the fifteen signatures in her personnel file and her signature on a training sign-in sheet are her signature. E. Exs. 6-7; Tr. 124:6-128:11; *see e.g., Coll. Bound Dorchester, Inc.*, No. 01-RC-261667, 2021 WL 2657318, at *1 (June 25, 2021) (“In support of this challenge, the Employer submitted seven documents from its files bearing Quesada’s signature. The Petitioner also submitted examples of Quesada’s signature in its possession, but the Acting Regional Director made no findings with respect to those documents.”). These signatures are every signature Longmont United has on file for Ms. Schalamon. *See* E. Ex. 6. The name written on Ms. Schalamon’s ballot clearly does not resemble her admitted and confirmed signature. *Compare* E. Ex. 6-7 and E. Ex. 5. Indeed, the majority of Ms. Schalamon’s printed names contain the same connected letters as the name printed on Ms. Schalamon’s ballot. *See* E. Ex. 6. Ms. Schalamon further admitted that her inscription on the “signature” line of her Social Security card, that was in cursive lettering, was not her signature, but her printed name. Tr. 107:20-25.

The Union, knowing the issue with Ms. Schalamon’s ballot, engaged in an attempt to transform her written name into something that would validate her ballot. The Union first instructed Ms. Schalamon to agree to (under penalty of perjury) a statement that Ms. Schalamon

did not write. U. Ex. 3; Tr. 119:3-114; Tr. 106:14-16. At that point, Ms. Schalamon was aware that her ballot had been challenged by the Employer on the basis that she did not sign her ballot. *Id.* When the Union called Ms. Schalamon to testify at the hearing, she testified that she “signed” every employment document introduced by the Employer. E. Ex. 6; Tr. 124:6-128:11. Only after prodding from the Union’s counsel did Ms. Schalamon attempt to claim that the name on her ballot was her signature. *See Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973) (the Board rejected the Employer’s evidence explaining, “the election has already been conducted and the evidence upon which the Employer would have us rely relates exclusively to events which have occurred subsequent to the date of the election. For very practical reasons, we cannot determine voter eligibility on the basis of after-the-fact considerations.”); *see also Kelco Roofing, Inc. & Loc. Union 135, United Union of Roofers, Waterproofers & Allied Workers, Afl-Cio.*, 268 NLRB 456, 460 (1983) (“I also find it significant that Long went to the extreme of having Hooks sign such a statement. It is evident from the outset that Long’s purpose was to create evidence. Otherwise, there was simply no reason to have Hooks sign such a statement. The question arises why Long was interested in creating evidence.”).

Ms. Schalamon’s confirmation of the signatures in her employment records and her contradictory claim at the hearing regarding her ballot cannot both be true. Her dissembling and apparent confusion are explained by the involvement of Counsel for the Union. Ms. Schalamon testified that the Union’s Counsel “explained... that it was important that [her] ballot be counted in this process” and “explain[ed] that the... Union’s margin was dependent upon whether or not [her] ballot was counted.” Tr. 121:4-9. Union Counsel’s aggressive handling of Ms. Schalamon is the only reason she attempted to rebrand what she inscribed on the ballot as her signature. That

attempted rebranding is simply not credible. Ms. Schalamon knew that her ballot would not be counted if she did not make claims that she signed the ballot and she knew that her ballot must be counted for the Union to win the election. The only fact upon which everyone agrees is that Ms. Schalamon's distinctive flourish containing no discernable letters is her signature and that this *actual and confirmed* signature is not present on her ballot. Thus, under the Board's well-established rule, her ballot was void at the time she printed her name on the ballot. The Region should not consider the Union's attempt to revise history or present its sham affidavit as a purported exemplar. Ms. Schalamon's ballot is and should remain void.

III. HOUSE SUPERVISORS

It is undisputed that the House Supervisors are certified Registered Nurses and would properly be in the Petitioned-for Unit, but for the Union's vague assertion that they are statutory supervisors. Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. 152. The burden of establishing supervisory status rests on the party asserting that status. *Croft Metals, Inc.*, 348 NLRB 717, 721 . (2006). Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489,

490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 , 1048 (2003). The Union fails to carry its burden in establishing the House Supervisors are statutory supervisors.

a. The Union Failed to meet its Burden on the Record Evidence, and thus, The Hearing Officer Cannot Sever This Group of Employees.

At the outset of the Hearing, the Hearing Officer explained the need for specific and detailed evidence in support of the Union's position that House Supervisors possessed the required supervisory indicia. Even after *additional* prodding from the Hearing Officer (Tr. 236:19-20), the Union did not offer any concrete examples of House Supervisors performing supervisory tasks or job duties. The Union presented the testimony of three Charge nurses, one of which only worked two shifts as a House Supervisor in the past year.

The Petitioner alleged that House Supervisors possess four supervisory indicia, lay-off, recall, assign, and transfer. The Petitioner presented no evidence that House Supervisors participate in the decision to lay off employees or recall such laid-off employees. The Union further failed to present any evidence that House Supervisors have any involvement in the decision to transfer employees. The record is devoid of any evidence that House Supervisors have the authority to alter the employment status of employees, which is exactly what is entailed in a lay-off, recall, and transfer.

As to the alleged assignment of employees under *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690 (2006), the Union relies on the House Supervisors' role in ensuring that certain units, not including the Birthplace unit, have the proper number of staff. However, the Union's witnesses

made clear that the House Supervisors 1) do not create the schedules for Units, 2) do not create the Staffing Plan, 3) do not evaluate the acuity of patients, 4) do not determine who is competent to work on each unit, and 5) do not assign employees to specific patients. The Union presented no evidence establishing the that the House Supervisors have the requisite independent judgment under *Oakwood* to assign employees. Accordingly, the Hearing Officer, and the Regional Director, must find that the Union failed to meet its burden without further consideration. Regardless, the record evidence is insufficient to support any conclusion that House Supervisors are statutory supervisors. They are eligible voters and their ballots must be counted.

b. House Supervisors do not Layoff and Recall Employees

The Union alleges that House Supervisors have the independent authority to lay off and recall employees. This claim is false. A “layoff” is defined as, “[t]he termination of employment at the employer’s instigation, [] through no fault of the employee; esp., the termination — either temporary or permanent — of many employees in a short time for financial reasons.” LAYOFF, Black’s Law Dictionary (11th ed. 2019).⁵ In *Panaro & Grimes, A P’ship d/b/a Azusa Ranch Mkt.*, 321 NLRB 811, 812 (1996), the Board held that managers who held the authority to “grant requests of employees to leave early, and can on [their] own decide to send an employee home for the day” did not have the authority to transfer, suspend, layoff, or recall employees, and were therefore not supervisors under the Act. Similarly, in *Millard Refrigerated Servs., Inc.*, 326 NLRB 1437, 1438 (1998), the Board held that that two leadmen were not statutory supervisors although they “may send employees home only when it [was] clear that their services [were] not needed for the

⁵ Termination of employment is defined as “the complete severance of an employer-employee relationship.” TERMINATION, Black’s Law Dictionary (11th ed. 2019).

remainder of the day.” The Board held that this authority failed to prove any of the indicia of supervisory status (including layoff and recall) and even if it did, “the decision to send employees home is based solely on the observation that there is no other work to be done and does not involve the use of independent judgment.” *Id.* In *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 492 (1989), the Board found that although a lead nurse had the authority to send aids home, this “suspension factor” authority did not amount to the authority to layoff or recall or any other Section 2(11) indicia. Finally, in *Cmty. Educ. Centers, Inc.*, 360 NLRB 85, 91 (2014), shift and unit supervisors had the authority to send employees home when there was no work or the employee requested to go home sick and “call in additional manpower, when necessary.” The Board held that this authority did not indicate the shift and unit supervisors had the authority to layoff and recall employees, and the Board declined to find statutory supervisory status. *Id.*

It is undisputed that House Supervisors do not lay off employees nor do they recall laid off employees. Tr. 251:14-19. The Union’s only witness that has any House Supervisor experience specifically testified that she “never laid anyone off, separated their employment” and “never recalled anyone who was separated from employment back from a layoff.” Tr. 251:14-19. Moreover, the Union’s attempt to argue that the House Supervisors’ ability to call in, float, or put employees on a “delay start” amount to a lay off and/or recall holds no merit under the Board’s precedent. Indeed, the above authority demonstrates that the remaining grounds asserted by the Union are meritless. The Union’s entire premise that application/implementation of the staffing plan is supervisory has been completely rejected by the Board.

c. House Supervisors do not Transfer Employees

The undisputed record evidence discloses that House Supervisors do not have the authority to permanently transfer employees. Tr. 200:22-201:9. Moreover, the Board has been clear that there is no exercise of authority to “transfer” under Section 2(11) when an employee simply directed an employee to another floor at the request of another employee or based on immediate need. *See Greenpark Care Ctr.*, 231 NLRB 753 (1977). For example, in *Children’s Farm Home*, 324 NLRB 61 (1997), the treatment team leaders (“TTLs”) were determined to not be statutory supervisors because they could not, among other things, use their independent judgment to transfer subordinates. TTLs could work together to trade or “transfer” employees to different departments temporarily, but they had no authority to make permanent transfers. *Id.* While TTLs assigned daily tasks to employees and could make temporary schedule adjustments, this authority to make temporary or “minor adjustments in employees’ work schedules to assure the presence of an experienced employee or to adequately deal with a crisis situation” was not of sufficient significance to amount to the authority to transfer, as contemplated in the Act. *Id.*; *see also Loparex LLC & Teamsters Loc. 662*, 353 NLRB 1224, 1235 (2009) (the Board held that shift leaders were not statutory supervisors because, among other things, “[t]he type of narrow selection authority for temporary transfers that is exercised by [the shift leader] here is not the authority to ‘transfer employees’ for purposes of Section 2(11).”); *C & W Super Markets, Inc. v. N.L.R.B.*, 581 F.2d 618, 621 (7th Cir. 1978) (the court affirmed the Board’s decision that managers were not statutory supervisors with the authority to transfer when the managers only “had the power to direct other employees to make sure that various routine tasks were taken care of, such as stocking

shelves, pricing items, filling empty trays, checking, etc.... and could allow employees to go home early if they were sick or if there was no work left for them to do.”).

The Union presented no evidence that House Supervisors transfer employees. The Union’s witness who was recently transferred confirmed that the House Supervisor was not at all involved in her transfer. Tr. 176:8-21. The only evidence regarding transfers and House Supervisors concerns the transfer of *patients*, not employees. As *Oakwood* holds, supervisory authority must involve authority over *employees*. Thus, it is irrelevant as to whether House Supervisors are involved in the transfer of patients.

d. House Supervisors do not Assign Employees with Independent Judgment.

In the Section 2(11) context, “assignment” is defined as the “giving [of] significant overall duties, i.e., tasks, to an employee,” but “significant overall duties” do not include “ad hoc instructions to perform discrete tasks.” *Oakwood Healthcare*, 348 NLRB at 689. Assignment also includes designating *an employee* to a place, such as a location, department, or wing, and appointing an employee to a time, such as a shift or overtime period. *Id.* Distributing working assignments to equalize work among employees’ well-known skills is considered a routine function not requiring the exercise of independent judgment. *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 4, citing *Oakwood* at 689, 693, 695. Assignment of work through a consensus of those that will be affected by the assignment does not meet the additional criteria of independent judgment. *Hospital General Menonita v. N.L.R.B.*, 393 F.3d 263, 267 (1st Cir. 2004). Accordingly, House Supervisors do not “assign” employees in accordance with the Board’s standards.

It is undisputed that the House Supervisors do not assign employees to care for patients based on a nurse's skill set and an evaluation of the patient's acuity. Tr. 192:6-11; Tr. 241:18-242:2. The Charge Nurses are responsible for each of those determinations. Tr. 192: 6-11. Ms. Chrisley testified that as the ICU Charge Nurse, she oversees the ICU unit "as a whole." Tr. 148:4-10. Ms. Chrisley testified that she, as Charge Nurse, is the person responsible for assigning RNs to patients based on the "acuity of the patient and the skill set of the RN." Tr. 158:12-17. Ms. Chrisley explained that Charge Nurses "look[s] at the acuity of all of the patients and try to split them up equitably. We look to see if a nurse has had that patient prior, to try to continue continuity of care. And if there's a certain skill set that's needed, [] then we place that patient appropriately." Tr. 160:12-19. The House Supervisors have no knowledge, outside what they are provided from the Charge Nurse or other RNs on a particular unit, what the acuity of a patient is. Tr. 250:9-251:12. Thus, House Supervisors do not have the authority to assign employees to patients within the meaning of the Act.

As to the House Supervisors' ability to move employees around the Hospital, the Board is clear that such movement is not sufficient when doing so is routine, clerical, and limited. *See Providence Hospital*, 320 N.L.R.B. 717, 731-32 (1996). At Longmont United, the Department Leaders and Nurse Manager put together a schedule designating nurses to a place, to a department, and a time. Tr. 191:15-21; Tr. 243:6-23. House Supervisors are not involved in scheduling of nurses. *Id.* Among other resource nurse duties, the House Supervisors simply help each unit adjust staffing levels in accordance with the predetermined Staffing Plan. *See* E. Ex. 9; Tr. 196:22-25. The House Supervisors do not draft the Staffing Plan, which dictates how many RNs, CNAs, techs, and other employees are needed based on the number of patients in the hospital. *Id.*; Tr. 192:16-

19; Tr. 244:7-10. For example, if the Staffing Plan dictates that there must be 3.6 nurses on a particular unit based on the number of patients in that unit, but there are only three nurses scheduled, the House Supervisor will go to the Charge Nurse for that unit to ask whether the Charge Nurse needs an additional staff. *See* E. Ex. 9; Tr. 195:20-196:9. If the Charge Nurse needs an additional Nurse, then the House Supervisor will work off a predetermined list of employees to call employees and ask if they want to work. Tr. 198:20-199:2. House Supervisors cannot force employees to work a particular shift. *Id.*; *Providence Hospital*, 320 N.L.R.B. 717, 731-32 (1996) (“More importantly, the charge nurses cannot require someone to come in.”). House Supervisors also do not independently evaluate the needs of a particular patient when determining whom to call in. Tr. 232:12-18.

This “call-in” process is similar to the “call-off” process as it is governed by the Staffing Plan and done in conjunction with the Charge Nurse on each Unit. The Board in *Oakwood* addressed the use of independent judgment in assigning nurses stating, “for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio.” *Oakwood*, 348 NLRB at 693. Similarly, the House Supervisors at Longmont United are provided a schedule, a pool of patients over several departments, and a list of nurses. The determination is not complex, it is the job of the House Supervisor to reduce staffing in compliance with the Staffing Plan or increase staffing by using the list of available nurses provided by the Department Leaders, Nursing Manager, and Charge

Nurse.⁶ Everything that follows, including moving nurses between departments, and calling in and calling off, is a function of this basic formula. House Supervisors do not determine whom they wish to choose when increasing or decreasing the work force. While the Union made much of the fact that acuity is not accounted for in the Staffing Plan—it is undisputed that any adjustment for acuity is based not on a House Supervisor’s independent judgment, but on the *Charge Nurses’* assessment of acuity and need to deviate from the ratio reflected in the Staffing Plan.⁷ Tr. 158:12-17.

In a desperate attempt to bolster its argument on this criterion, the Union improperly conflates the Board’s meaning of “assign” and “assignment” of employees with the assignment of patients. As *Oakwood* makes clear, supervisory authority to “assign” only applies to the assignment of “employees.” *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006). The fact that House Supervisors can place *patients*, has no relevance to House Supervisors’ alleged supervisory authority. The record is clear that Charge Nurses are the people that assign employees to patients based on the Charge Nurses evaluation on the acuity of patients and the skill sets of Nurses. Tr. 158:12-17. The only way a House Supervisor is involved in assessing the acuity of patients is when they are the RN that is responsible for that specific patient’s care. Tr. 250:9-251:12. Indeed, the Union attempts to argue that the Staffing Matrix does not account for acuity, which is incorrect

⁶ Longmont Hospital is required to follow regulatory standards for staffing nurses to ensure the nurse is competent to work in a particular unit. This determination is not made by the House Supervisors.

⁷ To the extent the Union argues that the House Supervisor’s opinion prevails over a Charge Nurse, the Union offered no specific evidence that this has ever occurred. Accordingly, the Union’s argument must be disregarded.

(see E. Ex. 9 at 1), however, even if it was true, the House Supervisor is not the one that assesses patient acuity in staffing a unit. *Id.* That responsibility is on the Charge Nurses. *Id.*

In *Saginaw Furniture Shops, Inc.*, 118 NLRB 421, 441 (1957), the Board examined the similarities between a putative supervisor's duties compared to rank-and-file employees and explained one could not be a supervisor while the others were not. The Board explained,

if Kanthack is a supervisor then Davey is also a supervisor, and by the same token the kiln operator is a supervisor, as he has authority to halt the unloading, summon the lumber handlers to pull a kiln, supervises the pulling of the kiln, and also directs the lumber handlers in the placement of the kiln trucks when they push same after loading to the kilns.

Id. The Board's observations in *Saginaw Furniture*, are particularly applicable here, where the Union attempts to exclude the House Supervisors, but did not challenge the appropriateness of the Charge Nurses in the Unit. As the record discloses, the Charge Nurses are the employees primarily responsible for the assignment of employees. However, even the House Supervisors' job in helping staff units, is done by the Charge Nurses in the Birthplace unit. Tr. 244:21-245:10. Charge Nurses in the Birthplace unit handle the staffing in the same way the House Supervisors would with respect to other units. *Id.*; E. Ex. 8. That is the Charge Nurses work off the Birthplace Staffing Plan to determine if the appropriate number of nurses are scheduled. E. Ex. 8. All Charge Nurses were eligible to vote in the election. It is illogical to deprive House Supervisors of their Section 7 rights while the Charge Nurses retain such rights by performing the very duties that the Union seeks to attribute to the House Supervisors (i.e. assignment of nurses to patients).

Accordingly, House Supervisors do not assign employees, as defined by the Act, and do not do so with independent judgment.

e. The Union is Subject to an Adverse Inference for Not Calling a House Supervisor Subject to its Challenges.

It is undisputed that the Union has the burden to prove that the House Supervisors are supervisors under Section 2(11) of the Act. The Union, through the Board's challenges, has asserted throughout these proceedings that House Supervisors have the independent authority to assign, layoff, recall, and transfer employees. Thus, the Union alleges that any of the House Supervisors that are subject to its challenges would have information favorable to the Union's position. *See Carpenters Local 405*, 328 NLRB 788, 788 fn. 2 (1999) ("it is well established that the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony may appropriately give rise to an inference that the witness's testimony would be unfavorable.") The Union, however, failed to call a single House Supervisor subject to the Union's/Board Agent's challenges. This explains the absolute dearth of examples of any purported exercise of genuine 2(11) authority. Instead, the Union attempted to rely on vague references and broad claims regarding alleged indicia. It must be inferred that the employees the Union purposefully did not call would have contradicted, rather than substantiated the Union's allegations.

It is Petitioner's burden to prove House Supervisors should be denied the right to vote. Petitioner clearly failed to meet its burden. Accordingly, House Supervisors' ballots should be opened and counted.

Dated this 13th day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, a true and correct copy of the foregoing LONGMONT UNITED HOSPITAL'S POST-HEARING BRIEF was e-filed with the NLRB E-Filing System and served via email on the following:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

NATIONAL NURSES ORGANIZING
COMMITTEE/ NATIONAL NURSES
UNITED, AFL-CIO (NNOC/NNU)

Petitioner,

and

LONGMONT UNITED HOSPITAL,

Employer.

Case 27-RC-275868

**POST-HEARING BRIEF BY PETITIONER
NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED, AFL-CIO (NNOC/NNU)**

NATIONAL NURSES ORGANIZING COMMITTEE/
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I. Introduction

Pursuant to NLRB Rules and Regulations 102.69(c)(1)(iii), Petitioner National Nurses Organizing Committee (“Union” or “NNOC”) files this post-hearing brief to the Hearing Officer. A hearing was held on August 31 and September 1, 2021,¹ on seven challenges in an election among registered nurses employed by Longmont United Hospital, conducted by mail ballot concluding on July 7.

Of the seven challenged ballots, five were cast by House Supervisors, who voted subject to challenge pursuant to the Regional Director’s Decision and Direction of Election (Board Exh. 2 at 11-12). The challenges to the House Supervisors’ ballots should be sustained because they possess and exercise the authority to assign the work of other employees of Longmont United Hospital (“Hospital” or “Longmont”). House Supervisors decide whether RNs and other employees work, when they work, where they work, for how long they work, and what their overall duties are at work. These decisions are made with the substantial independent judgment required to manage appropriate staffing levels in the complex and ever-changing environment of an acute-care hospital.

The two remaining challenges should be overruled: Mysti Schalamon is undisputedly an eligible voter whose unequivocal testimony is that she herself signed and cast her ballot. Christina Aangebrug is an RN who was on paid administrative leave from Longmont at the time she cast her ballot.

II. Statement of Facts

Pursuant to the Decision and Direction of Election (“DDE”) in this case, Registered Nurses (“RNs”) in the unit “who were employed during the payroll period ending May 15, 2021,

¹ All dates herein are in 2021 unless otherwise noted.

including employees who did not work during that period because they were ill, on vacation, or temporarily laid off” are eligible to vote (Board Exh. 2 at 11). The DDE directed that House Supervisors would vote subject to challenge. A mail ballot election was held, and the ballots were counted on July 7. The initial tally of ballots reflected that 93 votes were cast in favor of Union representation and 84 ballots were cast against. There were initially 15 challenged votes. Subsequently, and after briefing by the parties, four challenges were sustained, and four were cleared after briefing by the parties and a July 26 Decision by the Regional Director.² The four cleared ballots were counted and a revised tally of ballots was prepared reflecting 93 votes cast for the Union and 88 against, with seven remaining challenges. The seven remaining challenges included five RNs whose status as House Supervisors is not in dispute: Kristen Belina, Natalia Bennell, Emily Kellogg, Corin Schrock, and Vickie Stevens. The other two challenges were to the ballots of Mysti Schalamon and Christina Aangeenbrug. Since the challenges were determinative, a hearing was held on August 31 and September 1, pursuant to the Regional Director’s July 26 Decision.

At the hearing, three RNs testified who had firsthand knowledge of the role of House Supervisors and their regular exercise of authority to control wages and working conditions of RNs and other employees of Longmont. The Hospital’s sole witness on the issue largely corroborated the Union witnesses’ testimony. RN Mysti Schalamon also testified that she signed and mailed in her ballot. Longmont presented no evidence controverting this testimony, and also

² Longmont filed an objection to the election alleging that the Union “engaged in the solicitation of ballots and other conduct in violation of Board law and regulations” (Employer’s Objections to the Election, ¶ 2). With respect to the Employer’s objection, the Regional Director held “that the offer of proof produced by the Employer is not sufficient to meet its burden of showing that the conduct described could be grounds for setting aside the election if introduced and credited at a hearing,” and overruled the objection (July 26 Decision of the Regional Director at 4).

presented no evidence that RN Christina Aangeenbrug separated her employment with Longmont prior to casting her ballot.

A. RN Mysti Schalamon

Mysti Schalamon is a registered nurse who has worked in Longmont United Hospital's NICU continuously since 2015 (Tr. 103).³ Schalamon's eligibility to vote in the election is not disputed. Her name appeared on the two eligible voter lists provided by Longmont in June. She received a ballot kit in the mail in connection with the Union election (Tr. 104). Schalamon cast her ballot by mail, and it was received by the Region on or about June 25, 2021 (Emp. Exh. 5). Schalamon's unequivocal and un rebutted testimony is that her signature appears in the appropriate box on the outer ballot envelope (Tr. 104-105). The signature includes the letter capital M, followed by the connected letters spelling her last name (Emp. Exh. 5). Schalamon sometimes uses a signature that is different from the signature that appears on the ballot envelope, including a signature that is "a little bit of an M with a squiggly at the end, when [she is] in a hurry" (Tr. 111; see also, Emp. Exh. 6). On employment forms calling for a printed name, Schalamon writes her full first name, followed by the letters spelling her last name, with each letter disconnected from those adjacent, with the occasional exception of the "c" and "h," which are sometimes connected. (See, e.g., Emp. Exh 6 at 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14). Schalamon's printed name is distinct from her signature as it appears on the ballot envelope, in that the letters are not connected in her printed name, but they are connected in her signature.

The signature that appears on the ballot is identical to two exemplars in evidence: a declaration signed by Ms. Schalamon on or about July 9, 2021 (Union Exh. 2; Tr. 106); and a

³ Citations to "Tr.____" refer to the transcript of the hearing held on August 31 and September 1, 2021, which is consecutively paginated over two volumes.

driver's license (Union Exh. 6; Tr. 107).⁴ Thus, Ms. Schalamon's uncontroverted and unequivocal testimony is that she signed her ballot envelope and that her signature appears in the appropriate location on the ballot envelope. There has never been any allegation or evidence that anyone other than Schalamon signed and cast her own ballot.

B. RN Christina Aangeenbrug

RN Aangeenbrug is a registered nurse formerly employed by Longmont (Tr. 46). Aangeenbrug worked a shift at Longmont on April 3-4 (Tr. 47). On or about mid-April 2021, RN Aangeenbrug was on paid administrative leave from her position at the Hospital (Tr. 89; Union Exh. 4, Bates NNOC0014). Consistent with the DDE, Aangeenbrug was regarded by the Employer as an eligible voter while on administrative leave at the time the Employer submitted its list of eligible voters on June 1, *and* its revised list of eligible voters on June 15.⁵ RN Aangeenbrug received a ballot kit in the mail and voted in the Union election while she was on administrative leave, and her ballot was received by the Region on June 24 (Board Exh. 3). Aangeenbrug remained on administrative leave through the payroll period ending July 2 (Union Exh. 4, Bates NNOC0016), with the exception of the week of June 14, when she was on a pre-planned vacation (Tr. 56). There is no evidence that Aangeenbrug separated employment with Longmont prior to June 24 (Tr. 71). Beginning in the payroll period ending on or about July 16, Aangeenbrug no longer received Administrative Leave pay (Tr. 90), as she had continuously

⁴ At hearing, Ms. Schalamon was also presented with a copy of her social security card containing a "signature" line (Union Exh. 6). Ms. Schalamon's handwritten name appears on the signature line. Ms. Schalamon's typed name also appears on the social security card. To the extent that she may have been confused at the line of questioning regarding the social security card, such honest confusion in a formal government hearing in no way undermines her competence.

⁵ The Union hereby requests administrative notice of the voter lists transmitted by the Employer on June 1 and June 15, 2021, attached hereto as Exhibit A. The voter lists were e-filed with the Regional Director and emailed to the Board Agent and the undersigned counsel.

since April. RNs employed by the Employer sometimes work in other facilities associated with Centura Health, but remain employees of Longmont (Tr. 99-100).

The documentary evidence shows that Aangeenbrug's employment status with Longmont—paid administrative leave—on June 24 was the same as it was in April 2021 when she was undisputedly a Longmont employee and on June 1 and June 15 when the Employer submitted its list of eligible voters that included Aangeenbrug's name. That Aangeenbrug may have also worked at other Centura facilities at some point is irrelevant to whether she was an eligible employee of Longmont, especially in light of the evidence that other Longmont RNs have done the same, and the complete lack of evidence that Aangeenbrug separated her employment from Longmont.

C. House Supervisors

RNs Stephanie Chrisley, Kris Kloster, and Jamie Block testified each about their first-hand knowledge of the role of House Supervisors at Longmont. Chrisley is an ICU RN who works approximately two shifts per week as charge nurse. Kloster worked for 20 years as a Longmont ICU RN, including as charge nurse, and recently transferred to Longmont's PACU. Jamie Block is an Emergency Department RN Charge Nurse who, until July, worked shifts as a Per Diem House Supervisor. All three RN witnesses testified that House Supervisors have the authority to determine when RNs work, where they work, for how long they work, and their overall duties while they work. House Supervisors exercise significant independent judgment in doing so—they must manage a complex set of ever-changing circumstances and information in order to maintain appropriate staffing levels at the hospital. These RNs' testimony is entirely uncontroverted, and is supported by documentary evidence including job descriptions, Hospital policies, and directives from Hospital managers. Longmont did not call any House Supervisors

to testify at the hearing. The only Longmont witness to testify on the House Supervisor issue was Janet Davis, whose employment with Longmont was limited to serving as Interim Chief Nursing Officer from April to July of 2021 (Tr. 189). Davis' testimony largely corroborated that of the Union witnesses.

Kristen Belina, Natalia Bennell, Emily Kellogg, Corin Schrock, and Vickie Stevens are all undisputedly House Supervisors. (See, e.g., Regional Director's July 26 Decision on Challenges and Objection, at 3) The House Supervisors all have the same role and responsibilities (See, e.g., Tr. 188, testimony of interim CNO describing the role of the House Supervisors), and are subject to the same job description (Tr. 278-279). The House Supervisor has hospital-wide duties and responsibilities (Tr. 139), which are not specific to particular units of the Hospital.

1. Testimony of RN Jamie Block

Jamie Block is an RN who has worked at Longmont since April 2015 (Tr. 134). She currently works on a per diem basis as an Emergency Department charge nurse (Tr. 133). Up until July 2021, Block also worked on a per diem basis as a House Supervisor (Tr. 134). Block worked most of her House Supervisor shifts on weekends and has worked some partial night shifts as House Supervisor (Tr. 134). During her shifts as Emergency Department charge nurse, another employee served as House Supervisor, and Block interacted with those House Supervisors (Tr. 232-233). When she worked as per diem House Supervisor, Block's duties were the same as the duties of the permanent House Supervisors who she interacted with as charge nurse, and whose ballots are challenged in this matter (Tr. 225).

On nights and weekends, constituting the majority of Longmont's operating hours, the house supervisor is the highest-level authority at the hospital. (Tr. 134, 225).

House Supervisors' duties encompass "a big scope," including staffing for each of the units (Tr. 225). In other words, the House Supervisor decides how many RNs will work on a particular shift. As part of their staffing duties, House Supervisors "need to be sure that the unit is appropriately staffed with nurses and support staff... you're accountable [for staffing] for the duration of your shift and for staffing the oncoming shift" (Tr. 226). Far from being a rote or formulaic task, House Supervisors look at "a lot of different factors" in order to determine how many RNs and other staff will work on a given shift (Tr. 228), including: patient census in each unit (Tr. 227), the staffing matrix (*id.*), patient acuity (*id.*), types of patients in the Emergency Department (Tr. 230), and surgical volume (Tr. 231). The House Supervisor is responsible for knowing the acuity of each patient in a unit "when deciding how many staff work on that unit" (Tr. 229). The specific type of patient in the unit may result in the need for "more staff than is accounted for in the matrix." (*Id.*) House Supervisors' responsibilities with respect to staffing also include making sure that there are adequate technicians and CNAs, in addition to RNs (Tr. 230).

Hospital administrators are aware that House Supervisors exercise their independent judgment in making staffing decisions. The Administrator on Call will sometimes call the House Supervisor after the fact to find out the reasoning for the House Supervisor's staffing choices, and the House Supervisor will explain the factors that went into the decision (Tr. 231). For example, a House Supervisor might choose to "up staff" a certain unit because of a high number of surgical patients being admitted, or because the Emergency Department is experiencing high volume (Tr. 231).

Block testified that when working as House Supervisor, she departed from the staffing matrix "every shift" (Tr. 230), and that she was never disciplined for it (Tr. 231). For example,

Block would look at the matrix as a starting point, but would also consider whether the Emergency Department was “boarding” or holding onto patients who should be in the ICU, but were waiting for beds. The staffing matrix would not show that there were ICU patients in the Emergency Department and would not, on its own, show the adequate staffing levels (Tr. 230). Additionally, on some days there are high surgical volumes, which aren’t reflected in the staffing matrix. The House Supervisor needs to know these things and account for them in determining adequate staffing levels (Tr. 231).

Block testified that when she determines that more RNs are needed than were working or scheduled to work, she was responsible for getting RNs to come into work: “it’s your job to do everything you can to find the people to work” (Tr. 232). When there is a low census day, and more staff are working than are needed, the House Supervisor flexes, or sends RNs home in the middle of a shift (Tr. 236-237). House Supervisors have also sent RNs home early for other reasons. Block testified that she sent an RN who was assaulted by a patient home early because the RN was emotionally distraught. As House Supervisor, Block had the authority to “excuse[] her and allow[] her to go home and find...somebody else to come work” (Tr. 237).

There is variety in how the different House Supervisors exercise their authority with respect to staffing. Block testified that she brings her Emergency Department experience to her work as a House Supervisor. Based on this experience, she can gauge volumes coming into the hospital by looking at the Emergency Department, and she would increase staffing in certain units based on what she predicted would be coming in through the Emergency Department that day (Tr. 233). Other employees who serve as permanent House Supervisors have experience in the Intensive Care Unit, and “they will have a more keen eye for those coming and going from the intensive care unit and...are more apt to staff differently because of intensive care unit

changes...Each person in the role staffs and does the whole job, you know, differently because of their experiences in nursing” (Tr. 233-34). There can also be variation in what a charge nurse believes is appropriate staffing and what the House Supervisor believes is appropriate staffing. In those situations, the House Supervisor has the final say (Tr. 235).

House Supervisors control the tools that are required for RNs to perform their work. RNs require Personal Protective Equipment (“PPE”) to protect themselves from exposure to hazards at work (Tr. 238). On nights and on weekends, the House Supervisor controls access to PPE (*Id.*).

2. Testimony of RN Stephanie Chrisley

RN Stephanie Chrisley is an RN who works in the ICU at Longmont (Tr. 138). Chrisley works as charge nurse in the ICU approximately two out of her three weekly 12-hour shifts. (Tr. 138-139). Chrisley works day shifts, including weekends (Tr. 138). As a charge nurse, Chrisley interacts with House Supervisors frequently throughout the day, including updating the House Supervisor on the flow of patients in the ICU and the Hospital, and vice-versa. Sometimes Chrisley will talk to the House Supervisors up to 12 times per day (Tr. 139). Because of these frequent interactions with the House Supervisors, Chrisley has firsthand knowledge of their role. That role is to “oversee[] the flow of patients through the hospital...[T]hey determine when and where patients are moving throughout the hospital, sending people home, calling people in, in a shift-to-shift supervision of the flow of the hospital” (Tr. 139). As part of their duties relating to staffing, the House Supervisors refer to the staffing matrix, which is a “guideline” for appropriate nurse-to-patient ratios in each unit (Tr. 140). The staffing matrix is not followed at all times. (*Id.*) The staffing matrix does not contain any information or guidelines connected to patient acuity (*Id.*) Patient acuity refers to how sick a patient is, how stable they are, and how many titratable

medications they are on. (*Id.*) Acuity is directly related to staffing needs (Tr. 141). For example, “there are some patients that need a nurse at the bedside constantly... we call that a one-to-one patient... where a lower acuity patient maybe is able to call for help when they need to, they don’t have as many medications [and] they’re considered stable” (Tr. 140). Within the ICU, there are patients with different acuity levels (Tr. 140-141). Accordingly, the House Supervisors cannot rely on the staffing matrix alone in order to determine appropriate staffing levels.

In instances where more staff are scheduled than are needed in the ICU, the House Supervisor has the authority to cancel RNs’ shifts, send RNs home, and delay the start time of RNs (Tr. 148). Delayed start means that RNs are told not to report to work at the scheduled start of their shift, but are “to check in at an agreed upon time to see at that point if they will be needed” (Tr. 149). RNs are not paid when they are put on delayed start status (*Id.*).

Patients at Longmont are assigned a “patient status” upon admission to the Hospital: critical care, intermediate care (IMC), and general (medical-surgical or telemetry) (Tr. 141). The patient status can change throughout the patient’s stay at the Hospital as the patient’s condition changes. Physicians designate each patient’s status, and then the House Supervisor determines when and where the patient will be placed within the Hospital (Tr. 141-142, 156). This decision is based on factors including bed availability and staffing, as well as the physician-designated patient status (Tr. 142). Sometimes, the House Supervisor will place general status patients in the ICU because of Hospital flow and staffing needs (Tr. 142). In other words, House Supervisors determine what type of patients RNs in the ICU will be caring for, including how many patients ICU RNs will have and what the needs of the patients will be.

Like RN Block, Chrisley testified that there is variety in how the individual House Supervisors perform their duties (Tr. 142). House Supervisors use their own prior experience as

RNs in order to determine how to staff the Hospital. For example, House Supervisors with previous experience in the ICU are more “lenient with” staffing in the ICU because they have a better understanding of patient acuity in the ICU (Tr. 143). Those House Supervisors “certainly try to keep [the ICU] more appropriately staffed to acuity rather than strictly [to] the black and white matrix” (*Id.*)

House Supervisors are responsible for determining whether any RNs will “float” to units other than their own. Floating occurs when there are not enough RNs in one particular unit, and there is an excess of RNs in another unit. The House Supervisors make the determination for whether there is an excess or deficient number of RNs in any of the units (Tr. 144). After a House Supervisor determines that RNs should be floated, deciding who will be the RN to float is “not always a black or white issue” (Tr. 157).

House Supervisors can also decide where other Longmont employees work, in addition to RNs. As a charge nurse, Chrisley has made requests to the House Supervisors for additional staff: “I’d call the...house supervisor and just state exactly what the situation was at the time and why it is that I need staff at that time.” The House Supervisors would “not always, but sometimes provide additional staff...[I]t’s not always a guarantee, but it’s the only person, really, who can make it happen” (Tr. 145).

There have been instances where there were more RNs scheduled than were needed in the ICU. In such cases, the House Supervisor has the authority to cancel shifts, send RNs home early, or delay the start time of RNs’ shifts (Tr. 148).

House Supervisors are responsible for controlling supplies that RNs use to perform their work (Tr. 145).

3. Testimony of RN Kris Kloster

Kris Kloster is an RN who works at Longmont. Kloster first began working at Longmont in 2001, in the ICU. Kloster worked in the Longmont ICU for 20 years, until April 2021, when she transferred to the PACU (Tr. 168-169). During her time in the ICU, Kloster worked as a charge nurse “quite often,” including during nights and weekends (Tr.169-170). Like Block and Chrisley, Kloster testified that on nights and weekends, the House Supervisor is the highest level supervisor at the Hospital (Tr. 170). Kloster has firsthand knowledge of the role of the House Supervisor from her frequent interactions with them while working as a charge nurse (Tr. 170-171). As a charge nurse, Kloster discussed staffing, among other things, with the House Supervisor. RNs were instructed to call into the House Supervisor if they were calling in sick, and the House Supervisor then communicates that to the charge nurses (*Id.*)

When a House Supervisor determines that there are more staff than are needed for a shift, the House Supervisor has the authority to reduce staffing in that unit (Tr. 174). The House Supervisor reduces staffing in the ICU by floating an RN to another unit (*Id.*) Floating refers to “when you are scheduled for your own unit, but are needed to float to another unit” (Tr. at 172). Not all RNs at Longmont can float to any other unit. For example, ICU RNs can float to the telemetry or med-surg unit, but can’t float to the BirthPlace unit. ICU RNs can float to the ER, but can’t perform the full complement of nursing duties there (Tr. 173). House Supervisors can all place RNs on “delayed start” if they are scheduled but not needed. “Delayed start is when they tell you to stay home until a certain time...I would get a text that said...we’re putting you on delayed start until 11:00, check in at 10:00” (Tr. 174). House Supervisors can also send other employees home prior to the end of their shifts (Tr. 175).

Kloster affirmed that the House Supervisor is “the ultimate decider of how much staff we have and who that is,” and that they made that decision based on the staffing matrix, staff experience, and patient acuity (Tr. 179).

4. Testimony of Former Interim Chief Nursing Officer Janet Davis

Ms. Davis served as interim Chief Nursing Officer at Longmont for three months, from April to July 2021 (Tr. 187, 210). Davis was Longmont’s only witness to testify about the House Supervisors, and her testimony largely corroborated that of the Union’s witnesses with respect to the substantial independent judgment vested in House Supervisors with respect to staffing. According to Davis, the role of House Supervisors at Longmont includes determining “if anybody can float between units” (Tr. 188). Davis testified that the staffing matrix is in fact “a guideline... or a plan,” (Tr. 193), and that “it is not a rigid document” (Tr. 194). Davis also testified that a charge nurse “can definitely... say I need more help. My patients are sick” (Tr. 194) to the House Supervisor, and the House Supervisor decides whether to supply additional staff to the unit (Tr. 202). The House Supervisor is the one who knows “whether another unit has extra help or somebody, maybe Med-Surg has a lot of discharges, and so they [the House Supervisor] could send somebody there” (Tr. 202). Davis also testified that when charge nurses call the House Supervisors for additional staff, the House Supervisor’s “goal is to really find help if they need it. And so they would send out a text. Or if they already know that another unit’s not busy... so somebody can come over and help” (Tr. 203). In order to gather all of the information that they need to fulfill their staffing responsibilities, House Supervisors “round[] all the units, so they [] know what’s going on... They walk around and see how things are going, ask you know, how’s it going? Everybody okay? You need anything?” (Tr. 203).

Davis testified that with respect to determining which RNs will be placed on delayed start, the House Supervisor may initially consult a list of which RN was put on delayed start most recently, but that there were a lot of exceptions to that list, which House Supervisors consider in determining who will be put on delayed start (Tr. 209).

5. Hospital Policies, Procedures, and Job Descriptions

The testimony of RNs Block, Chrisley, and Kloster is in accord with and corroborated by the Hospital's own policies, job descriptions, and other communications regarding the role of the House Supervisors.

a. Job Descriptions

Davis testified that Union Exhibit 1 is a job description applicable to House Supervisors employed at Longmont as of May 7, 2021, and that Union Exhibit 11 is a job description applicable to House Supervisors at Longmont as of June 17, 2021 (Tr. 279). Both versions of the House Supervisor job description provide that employees in this classification are “responsible for coordination and direction of safe and efficient patient care and throughput in the hospital,” and “serves as a clinical resource person in delivery and supervision of direct and indirect care processes.” The House Supervisor also “*serves as agent for the department and hospital executives* when they are not present.” (emphasis added) Thus, according to the Employer's own job description, the House Supervisors possess the authority to responsibly direct work throughout the hospital, supervise the delivery of patient care, and to stand in for the highest level hospital executives when those executives are not present, as the agent of those executives. While job descriptions are not dispositive of supervisory status, these documents corroborate the RNs' testimony that House Supervisors are the highest level supervisors at the Hospital on nights

and weekends when other administrators and executives are not there, as well as their testimony that House Supervisors supervise the delivery of patient care.

b. Staffing Matrixes/Guidelines

The Union's witnesses, and in fact Longmont's own witness Davis, repeatedly testified that the staffing matrix is a mere "guideline" (Tr. 140, 193, 194, 247) The document described by Davis as the matrix for the BirthPlace and admitted into evidence as Employer Exhibit 8 is in fact called "guidelines" on its face. Exhibit 9 refers to "ideal" staffing management for the MICU, not required staffing management. Rather than containing a precise formula for House Supervisors to follow in a rote manner, the guidelines themselves contain ranges of appropriate staffing levels for various census levels, and other text indicating wide discretion afforded to the House Supervisors. The MICU staffing grid provides that the House Supervisor should "consider" particular staffing ratios, and contemplates "extenuating circumstances" in which staffing ratios might be altered.

c. Capacity/Patient Flow Management Guideline

The Capacity/Patient Flow Management (LUH) Guideline (Union Exh. 8) is a policy currently in effect at Longmont (Tr. 283). This document indicates that the House Supervisors are required to exercise considerable independent judgment in making decisions that affect RNs' work duties. It is Hospital policy that nursing ratios may need to be higher than what the staffing plans call for, "taking into account patient acuity, staff skill mix, and throughput optimization" (Union Exh. 8 at 2). According to the policy, the House Supervisor must review information far beyond the staffing matrix, including conferring with clinical department leaders and case managers about "bed availability, anticipated discharges, and assigns [sic] beds for post-operative inpatient cases" (Id. at 1). House Supervisors have the authority to authorize or decline

to authorize delayed transfer of patients from the emergency department to inpatient care units, upon request by other staff (Id. at 2). In the event that unit capacity is hindering patient flow, the House Supervisor “*may*” but is not required to send a notice to the attending physician.

This guideline supports the testimony that House Supervisors are vested with a substantial amount of discretion in performing their staffing duties, which includes making decisions that impact employees’ working conditions.

d. Rod Curran Email

Rod Curran is the Fifth Floor Manager, which includes Pediatrics, Orthopedics, Oncology, Medical Surgical, Float Pool (Tr. 284; Union Exh. 9A) In an April 28, 2020 email, Curran sent an email to “clear up confusion about the [delayed start] process” among Longmont employees (Union Exh. 9A).⁶ The email was authenticated by Longmont’s Custodian of Records, Curran explained to employees that House Supervisors have complete discretion to “pick any duration of the delay, there is no guidelines [sic] to what number of hours are chosen” (Union Exh. 9A at 1). House Supervisors’ decisions and instructions about delayed start are considered to be mandatory on RNs; if RNs “do not respond when the House Sup calls with a change, before the start of [an RN’s] shift, then it would be considered an absent” (Union Exh. 9A at 1).

⁶ The email was authenticated by Longmont’s Custodian of Records as an email sent by Fifth Floor Manager Rod Curran. It is an opposing party’s statement under FRE 801(d)(2). (See, e.g., *Ferguson Enterprises, Inc.*, 355 NLRB 1121 n. 2 (2010) (supervisor’s statements to an employee were nonhearsay admissions under FRE 801(d)(2)). Nevertheless, “the Board follows the Federal Rules of Evidence only “so far as practicable,” and may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable.” *Rome Elec. Sys.*, 356 NLRB 170, 171 (2010). Curran’s email is both probative of the House Supervisor’s role in delayed start, and inherently reliable as an authenticated email by a manager.

III. Argument

A. Mysti Schalamon

There is no dispute that at all relevant times Mysti Schalamon has been an RN employed by Longmont United Hospital and eligible to vote in the election. Ms. Schalamon testified unequivocally that her signature appears on the ballot envelope. There is no basis for disenfranchising Ms. Schalamon, and her vote should be counted.

At the ballot count held on July 7 the Employer took the position that the name appearing on Ms. Schalamon's ballot was printed. The Union disagreed. The Board Agent expressed her opinion that the name appearing on the ballot was a signature (See, e.g., Employer's July 14 Statement of Position Regarding the Election Challenges at 10). The Board Agent did not determine that the name on the envelope was printed, and did not declare it as void. The Employer challenged the ballot on the basis that Schalamon had allegedly printed her name on the envelope.

The NLRB Casehandling Manual provides that ballots returned in envelopes with names printed rather than signed should be voided. If there is a question about whether the name is printed or signed and the parties do not agree, the Board Agent should void the ballot *if she determines that the name is printed*. NLRB Casehandling Manual (Part Two) Sec.11336.5(c). If a party contests the Board Agent's determination that the ballot is printed, the ballot is treated as challenged. *Id.* The Casehandling Manual does not permit a party to challenge a ballot where the Board Agent has *not* determined that the name on the ballot is printed. In *Thompson Roofing*, 291 NLRB 743 (1998), the Board Agent, consistent with the Casehandling Manual, had ruled that the ballot was void because his name was printed rather than signed. The employer properly challenged that ruling by the Board Agent. Importantly, there was no dispute between the parties

that the name appearing on the envelope was printed rather than signed. *Id.* at 744. The employer in that case argued that the ballot should be counted despite the lack of signature, since there was no evidence of fraud or deceit. The Board disagreed with the employer and held that the ballot was void on the basis of the Board Agent’s determination that the name on the ballot was printed, to which both parties had agreed. Here, there has been no determination by the Board Agent that the ballot is not signed, and the Union and Ms. Schalamon herself vehemently dispute the Employer’s contention that the ballot was not signed.

The Board has held that a signature on a mail ballot that varies from other known examples “*may*, depending on the circumstances, raise substantial and material issues regarding the identity of the person who marked the ballot.” *College Bound Dorchester, Inc.*, 01-RC-261667, slip op. at 2 (2021) (not reported in Board volumes), 2021 NLRB LEXIS 251, *4 (June 25, 2021) (emphasis added). The Board did not hold that a mail ballot signatures that differs from exemplars renders the ballot void. Instead, noting discrepancies between the ballot signature and exemplars in evidence, the Board remanded the matter to the Regional Director for a hearing on the sole issue of whether the ballot “was cast by an eligible voter.” *Id.*, at 3. Here, a hearing has been held, and there has never been any allegation—let alone any evidence—that the ballot was cast by anyone other than RN Schalamon.

The uncontroverted record evidence is that Ms. Schalamon’s ballot was cast by her, and that the name contained on Ms. Schalamon’s ballot envelope is her signature. The Board has never held that a ballot should be voided where the Board Agent did not determine that the name was printed, there is no dispute that the ballot was cast by the eligible voter, and the voter has testified that her signature appears on the ballot envelope.

B. Christina Aangeenbrug

Employees who are employed on the eligibility date and also on the date they cast their timely ballot are eligible to vote. *Plymouth Towing Co.*, 178 NLRB 651 (1969). Employees on leave during the eligibility period are eligible to vote. *Town Concrete Pipe of Wash., Inc.*, 259 NLRB 1002, 1004 (1982) (overruling the challenge of an employee who was on medical leave at the time of an election). RN Aangeenbrug was employed by the Employer and on paid administrative leave status on both the eligibility cut-off date and the date that she cast her ballot, and her vote should be counted.

C. House Supervisors

Statutory supervisors, as defined by Section 2(11) of the National Labor Relations Act (“Act”), are appropriately excluded from bargaining units of RNs. The possession of any one of the indicia set forth in Section 2(11) is sufficient to make an individual a supervisor. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Under Section 2(11), a supervisor is:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). “If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006).

Because each of the indicia share “the common trait of affecting a term or condition of employment, [the Board] construe[s] the term ‘assign’ to refer to the act of designating an

employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). In the health care context, the assignment of employees “to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee,” and is considered a supervisory function. *Id.*

Whether the act of assigning work is done with the independent judgment necessary to render it supervisory turns on “the degree of discretion exercised by the putative supervisor... judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693. Specifically, “a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio,” but “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Ibid.*

Here, there is ample specific evidence that House Supervisors assign work to RNs and other employees, and are afforded substantial independent judgment in doing so, in the interest of the employer. First, there is no question that House Supervisors’ duties with respect to staffing are done in the interest of the employer. In fact, by Longmont’s own job description, the House Supervisors are *agents* of Hospital executives. Interim CNO Davis discussed various staffing and other duties of House Supervisors as being part of the Hospital’s expectations of House Supervisors.

As part of their duties relating to appropriately staffing the hospital, House Supervisors possess and exercise the authority to appoint employees to a time of work: they can delay the start of employees' shifts, send employees home early before the end of their shift, call them into work when they are not scheduled, and cancel their shifts entirely if they are not needed. In each instance, employees' pay is affected, going to the core of employees' working conditions. House Supervisors' decisions affecting employees' time of work are made with independent judgment. Although the existence of company policies would not undermine the assertion of independent judgment, here, instructions from statutory supervisor Rod Curran regarding delayed start explicitly state that there is *no* policy to guide the House Supervisors' decisions with respect to delaying employees' start time: "the House Supervisor can pick any duration of the delay, there is [sic] no guidelines to what number of hours are chosen."

Likewise, there is no policy that House Supervisors must adhere to when deciding whether to reduce or increase staffing. House Supervisors instead reach their own conclusions by integrating their own background knowledge and experience with real-time information gathered from other employees, census data, acuity information, predictions about incoming patients, anticipated change in patient status and needs, and other factors as appropriate. Davis testified that in order to perform their staffing responsibilities, House Supervisors walk around to each unit of the hospital talking to employees and gathering information from them about how things are going and what staffing needs there may be. While the staffing matrix may provide guidance to the House Supervisors, the only witness to have worked as a House Supervisor at Longmont testified that she departed from the matrix on every single shift, and was never counseled or disciplined for doing so. The matrix document itself is called a "guideline," and every witness

testified that the matrix is not strictly adhered to. Nor could it be, as it does not incorporate any information about patient acuity, which is critical to staffing.

The discretion afforded to House Supervisors manifests in some House Supervisors being more strict or more lenient with staffing and staffing departments differently. This has a direct impact on RNs' working conditions because it determines the number and type of patients that nurses will be caring for on their shift. For example, Block testified that her experience as an Emergency Department nurse informed her decisions while working as a House Supervisor. She is more cognizant of the staffing needs of the Emergency Department and staffs it accordingly. Other House Supervisors have experience as ICU RNs, and are more likely to be lenient with staffing in that unit.

House Supervisors have the discretion and responsibility to determine which unit patients are placed in. While doctors assign a "status" to each patient, that status does not determine where the patients are placed or which RNs will care for them. The House Supervisors may, for example, determine that it is appropriate to place a "general" status patient in the ICU, even though the patient could be placed in another department of the Hospital. Assigning a lower acuity general patient to ICU RNs will, as noted, make all the difference in the work day of that employee." *Oakwood Healthcare*, 348 NLRB at 689. Similarly, House Supervisors can float employees to departments other than the ones they are scheduled to work in, directly affecting which types of patients those employees will care for. While it's true that in most departments the decision about which specific patients will be cared for by specific nurses is made by non-House Supervisors, the House Supervisors are the ones who decide the mix of patients that are assigned to the department. Thus, the House Supervisors determine the significant overall tasks for the RNs in each unit.

The challenges to the five House Supervisor ballots should be sustained because they were cast by supervisors who exercise independent judgment to determine whether an RN will work, when they work, for how long they work, and who their patients will be.

IV. Hearing Officer's Rulings on Subpoena Issues

Counsel for Longmont complains that the Union did not produce documents that he apparently believes he subpoenaed in Paragraph D of Subpoena No. B-1-1DGBCHV. That paragraph, which was revoked along with the rest of the subpoena, sought "The original declaration attached to the Union's Statement of Position and correspondence transmitting the same." Board Exh. 4. By its own terms, Paragraph D sought only communication that accompanied the originals of the signed declarations that were attached to the Union's position statement. On the record, it became clear that Counsel for Longmont believed that Paragraph D would encompass a broad array of documents that it did not in fact describe, including documents reflecting "contents provided prior, drafts of statements... Communications relating to the statements," and even any documents reflecting "contact with the witnesses" (Tr. 22-23). In the course of arguing that Paragraph D be read to encompass documents far beyond what it actually describes, Counsel for Longmont accused the undersigned counsel of "trying to conceal" information, and of having "made a tactical error" (Tr. 23). Clearly, there is no basis for any of Counsel's contentions on this issue, including his contentions about the undersigned counsel. In any event, the statement of RN Schalamon was admitted into evidence only as an exemplar of her signature, and not for the truth of the matters asserted therein (Tr. 117).

Counsel for Longmont falsely claimed on the record that "we've had no production from the Petitioner to this point" in response to the Subpoena Duces Tecum that it served on the first day of hearing (Tr. 265). The subpoena sought "documents substantiating Petitioner's allegations

regarding the four (4) supervisory indicia identified in Petitioner’s Statement of Position in response to the Regional Director’s Order on Challenges” (Board Exh. 5). As counsel for the Union explained, all of the documents relied upon to substantiate the allegations contained in the Statement of Position were attached to that Statement of Position, which was submitted to the Employer (Tr. 255). Later, Longmont provided additional documents to the Union in response to the Union’s subpoena, which also substantiated the Union’s allegations to be presented at hearing, though they were not used to substantiate the Union’s Statement of Position. (*Id.*) Counsel for the Union identified each of these documents on the record at hearing, providing detailed descriptions of the documents and referring to the documents as Longmont itself had identified them in its subpoena production (Tr. 256-258). In doing so, Counsel “accurately describe[d] the documents that were previously provided and state[d] whether those documents constitute all the documents being subpoenaed.” ALJ Bench Book at 79. Two of the documents had already been admitted into evidence as Employer’s exhibits 8 and 9. In addition to identifying all of the responsive documents in detail, Counsel for the Union emailed four of the documents to Counsel for Longmont (Tr. 265). Those four documents were ones that had already been identified by Counsel for the Union. To the extent that there was any error by the Hearing Officer in granting a petition to revoke the subpoena—which there was not—the error was without prejudice since the Union provided all responsive documents to Longmont.

V. Conclusion

For all of the foregoing reasons, the challenges to the votes of the House Supervisors should be sustained and the challenges to the votes of Mysti Schalamon and Christina Aangeenbrug should be overruled.

DATED: September 13, 2021

Respectfully submitted,

NATIONAL NURSES ORGANIZING
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